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No. (1)

Supreme Court, U.S.
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In The
Supreme Court of the United States

HARRIS COUNTY BAIL BOND BOARD;
HARRIS COUNTY,

Petitioners,

v.

CARL R. PRUETT; SCOTT MARTIN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. This Court has held that when a state regulation implicates First Amendment rights, the Court "must balance those interests against the State's legitimate interest in regulating the activity in question". Further, the Court has stated that a "less-restrictive-alternative analysis" has never been a part of the inquiry into the validity of a time, place, and manner regulation. In the instant case the Respondents attacked the constitutionality of a state law which, in part, restricts solicitation of bonding business related to an individual with an outstanding arrest warrant that has not been executed. The Court of Appeals held that this part of the statute is not narrowly tailored, because it prohibits solicitation of targets "days, weeks, or even months after warrants are issued." Further, although the Texas Legislature tailored the statute by excluding contact related to Class C misdemeanors from the coverage of the statute, the Court of Appeals held that the breadth of crimes still covered by the statute is "simply too broad".

The questions presented are (1) whether the failure to impose a time limit on the prearrest restriction renders the statute unconstitutional, even if a time limit would defeat the purpose of the statute in certain cases and (2) whether the Court of Appeals' requirement that the Legislature allow solicitation of certain Class A and B misdemeanor targets as a condition for constitutionality is contrary to this

QUESTIONS PRESENTED – Continued

Court's precedents which do not permit invalidation of a preferred remedial scheme because some alternative solution is marginally less intrusive.

2. The Court has stated that a prevailing plaintiff in a civil rights case should ordinarily recover an attorney's fee "unless special circumstances would render such an award unjust". In the instant case the Respondents attacked the constitutionality of a state law. Petitioners did not promulgate the law or enforce it against the Respondents. The Respondents sought prospective relief. Consequently, Petitioners argued that, because the only action taken by them was to defend this action, special circumstances exist which would render an award of any attorney's fees against them "unjust". The Court of Appeals held that the Petitioners failed to make an extremely strong showing of special circumstances, stating that even defendants lacking culpability should pay attorney's fees.

The question presented is whether a local enforcement authority's lack of responsibility for an alleged constitutional violation can be a circumstance which would render an award of attorney's fees unjust.

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PETITION FOR A WRIT OF CERTIORARI

The Harris County Bail Bond Board and Harris County respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 499 F.3d 403. The opinion of the district court is reported at 400 F. Supp.2d 967. The district court's order on the issue of attorney's fees is unreported. Each of these opinions is reproduced in the Appendix to this petition.

STATEMENT OF JURISDICTION

The Court of Appeals entered its opinion and judgment on August 28, 2007. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1). In accordance with Rule 29.4(c), Petitioners state that the constitutionality of a Texas statute has been drawn into question in this case and 28 U.S.C. § 2403(b) may apply. A true and correct copy of this petition has been served upon the Attorney General of Texas. Although a copy of the Original Complaint was served upon the Attorney General, Petitioners do not believe that the lower courts certified to the

Attorney General the fact that the constitutionality of a Texas statute was drawn into question.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions involved in this case, Tex. Occ. Code Ann. § 1704.109(b) and 42 U.S.C. § 1988(b), are reproduced in the Appendix.

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331 and 1343(a)(3) and (4). Respondents Carl R. Pruett and Scott Martin sought declaratory and injunctive relief pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 2201. They alleged that a then newly amended Texas statute, Tex. Occ. Code Ann. § 1704.109 (Vernon 2003) unconstitutionally restricts their free speech rights. The statute places time restrictions upon bail bondsmen making unsolicited contact with potential customers to solicit bonding business. Respondents are bail bondsmen whose business practices conflict with the statute. The district court concluded and held that "the statute is unconstitutional". *Pruett v. Harris County Bail Bond Board*, 400 F. Supp.2d 967, 980 (S.D. Tex. 2005). The court enjoined the Bail Bond Board and Harris County from enforcing the statute and awarded the Respondents attorney's fees in the amount of $50,000 plus an additional $25,000 in the event of an appeal.

The court noted in its order awarding attorney's fees that: "(a) Harris County is not involved in the regulation of bail bondsmen; (b) the Harris County Bail Bond Board is not a policy-making body; it merely enforces the laws and policies of the state of Texas; and (c) neither Harris County nor the Bail Bond Board enforced the statute against the plaintiffs". ROA 4632.

On appeal the United States Court of Appeals for the Fifth Circuit affirmed in part and reversed in part the district court's decision on the merits. The court concluded that Subsection (b)(2)(A) of the statute, which prohibits in-person and telephone solicitation at late hours, survives *Central Hudson* scrutiny. *Pruett v. Harris County Bail Bond Board*, 499 F.3d 403, 415-416 (5th Cir. 2007). The remainder of subsection (b) was considered unconstitutional. The court concluded that subsection (b)(1), which prohibits solicitation of bonding business related to an individual with an outstanding arrest warrant, is not narrowly tailored. *Id.* at 413-414. The court further concluded that the Petitioners had not shown that the 24-hour ban contained in subsection (b)(2)(B) directly serves the state's interest in privacy. *Id.* at 414-415. The Court of Appeals vacated and remanded the district court's award of fees for further consideration. The Respondents had requested attorney's fees of almost $200,000. Petitioners argued that "special circumstances" should preclude awarding any attorney's fees. When addressing the question of "special

circumstances" the Court of Appeals said the following:

> "That a defendant does not promulgate a policy does not eliminate the costs the plaintiff had to bear in securing his rights, hence even defendants lacking culpability and acting in good faith should pay attorney's fees."

Id. at 417. The court therefore concluded that the Petitioners had "failed to make an extremely strong showing of special circumstances." *Id.*

REASONS FOR GRANTING THE WRIT

The Texas statute invalidated in part by the Court of Appeals in this case, Section 1704.109(b) of the Texas Occupations Code, does not offend constitutional protections as it merely places reasonable, temporal restrictions on commercial speech. Commercial speech – that is, speech that relates to a commercial transaction or the economic interests of the speaker – is accorded limited constitutional protection and is subject to regulation that would be impermissible in the context of noncommercial speech. In that regard, there is no requirement that the law enacted must be the "least restrictive alternative", as required in restrictions of noncommercial speech. Rather, the perceived problem and the governmental solution must have a relationship that can be described as a "reasonable fit". Of course, the problem

must be real and the solution must be a reasonable restriction of speech.

The purpose of Section 1704.109(b)(1) is the protection of law enforcement officers and the public from physical harm during the process of arresting an offender. Section 1704.109(b)(1) does not curtail speech, but merely postpones it until after the accused has been arrested. The Fifth Circuit's determination that this restriction is unconstitutional is a misapplication of this Court's precedents regarding commercial speech and time, place and manner regulations.

The statute is substantially similar in content to the Harris County Bail Bond Board's Local Rules 24 and 25. Such rules were held to be constitutional in *Harris County Bail Bond Board v. Pruett*, 177 S.W.3d 260 (Tex. App. – Houston [1st Dist.] 2005, pet. granted), save and except for the 24-hour provision contained in Local Rule 25. All of the parties in that case filed petitions for review in the Supreme Court of Texas. The petitions were granted and the case remains pending before that court at this time.

I. The Restrictions Upon Commercial Speech Which Are Imposed By Section 1704.109(b)(1) Do Not Offend Constitutional Protections.

In *Florida Bar v. Went for It, Inc.* this Court considered the validity of attorney disciplinary rules that created "a brief 30-day blackout period after an accident during which lawyers may not, directly or

indirectly, single out accident victims or their relatives in order to solicit their business". 515 U.S. 618, 620-621 (1995). The Court found this form of advertising to be "commercial speech" that, although "accorded a measure of First Amendment protection", is "subject to modes of regulation that might be impermissible in the realm of noncommercial expression". *Id.* at 623 (internal quotations and citations omitted). For example, "the government may freely regulate commercial speech that concerns unlawful activity or is misleading". *Id.* at 623-624. Commercial speech falling outside these categories

> may be regulated if the government satisfies a test consisting of three related prongs: First, the government must assert a substantial interest in support of its regulations; second, the government must demonstrate that the restriction on commercial speech directly and materially advances that interest; and third, the regulation must be narrowly drawn.

Id., citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980) (internal quotations omitted).

When applying the *Central Hudson* test in this case the Court of Appeals agreed with the district court that the governmental interests asserted by the Petitioners in support of the statute's constitutionality are substantial. Those interests included diminishing (1) the flight risk for felony offenders and high-level misdemeanor offenders; (2) the risk of harm to

arresting officers, defendants, and bystanders when such defendants are arrested; (3) the risk of harm to victims, family members, or witnesses from retribution; and (4) the potential for the destruction of evidence. 499 F.3d at 411. The Court of Appeals further accepted that subsection (b)(1) directly advances the state's interests. 499 F.3d at 412. However, the Court of Appeals concluded that subsection (b)(1) is not narrowly tailored because it prohibits solicitation of targets "days, weeks, or even months after warrants are issued". 499 F.3d at 413. Further, the court held that the breadth of crimes covered by subsection (b)(1), combined with the statute's temporal breadth, is "simply too broad". 499 F.3d at 414.

Although the Court of Appeals correctly noted that the statute is a restriction that involves "methods, times, and subjects of solicitation and does not have as a goal the suppression of speech", the court failed to apply this Court's precedents established in time, place, and manner cases. 499 F.3d at 409 n.5, 412-414. As this Court said in *Ward v. Rock Against Racism*, 491 U.S. 781, 798-799 (1989), regulation of protected speech in such cases need not be the least restrictive or least intrusive means for serving the government's legitimate, content neutral interest. "Rather, the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation'." *Id.* As long as the means chosen are not substantially broader than necessary to achieve the government's interest the

regulation will not be invalid "simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative". *Id.* at 799.

In the instant case the Court of Appeals concluded that the Texas Legislature could alter the statute to include a "time limit on solicitation, with a window prior to solicitation that would give police officers time to act". However, the problem with that less restrictive alternative is its potential to defeat the government's legitimate interest in protecting officers from harm in cases in which a fugitive is difficult to find. Although most arrest warrants can be executed within a few days after issuance, others may take longer. If the person to be arrested is tipped off about the impending arrest as a result of a bail bondsman's solicitation call, the risk to the arresting officer remains the same whether a long or short period of time has elapsed since the issuance of the warrant. Thus, a given "window prior to solicitation" may prove to be inadequate. If a suggested alternative is not "adequate" to achieve the government's interest, it cannot supplant the means chosen by the government. Compare *Turner Broadcasting System, Inc. v. F.C.C.*, 520 U.S. 180, 218 (1997) ("In any event, after careful examination of each of the alternatives suggested by appellants, we cannot conclude that any of them is an adequate alternative to must-carry for promoting the Government's legitimate interests.").

To require as a condition for constitutionality of the statute an arbitrary cutoff of the statute's protection, say four or five days after issuance of the warrant, would involve the courts in determining the degree to which the government's interest in officer safety should be promoted. In the instant case the alternative hypothesized by the Court of Appeals reflects nothing more than a disagreement with the Texas Legislature over how much protection is appropriate. Compare *Ward*, 491 U.S. at 800 ("The alternative regulatory methods hypothesized by the Court of Appeals reflect nothing more than a disagreement with the city over how much control of volume is appropriate or how that level of control is to be achieved."). Like the Court of Appeals in *Ward,* the Court of Appeals in the instant case erred in failing to defer to the Legislature's reasonable determination that its interest in protecting officers and the public would be best served by prohibiting solicitation of bonding business related to an individual with an outstanding arrest warrant until after the arrest is made. In that regard the Court of Appeals stated that "it is relevant that other, less-restrictive and more-tailored means exist". 499 F.3d at 412. This statement coupled with the court's citation of *Riley v. Nat'l Federation of the Blind of N.C., Inc.*, 487 U.S. 781 (1988), a case which involved a content-based regulation and fully protected speech (charitable solicitation), rather than a time, place and manner regulation and purely commercial speech, demonstrates that the court was not applying this Court's

time, place and manner/commercial speech precedents when it concluded that the statute in question is not sufficiently tailored to pass constitutional muster. 499 F.3d at 413 n.23.

Although the Court of Appeals said that it did not cast as unreasonable the Legislature's choice to exclude from the coverage of the statute only Class C misdemeanors, it considered the breadth of crimes covered by subsection (b)(1) to be simply too broad. 499 F.3d at 414. The Court concluded that subsection (b)(1) "could reasonably allow solicitation of certain Class A and B misdemeanor targets, those not liable to run". *Id.* The difficulty with that alternative, in part, is its implementation through legislative enactment. The Court of Appeals' suggestion defies any legislative body's ability to draft adequately worded legislation. Similarly, the district court suggested that a "screening mechanism" could be utilized by bail bondsmen to allow solicitation in all cases except certain categories of "risky arrest warrants". 400 F.Supp.2d at 979. One can only wonder how the Legislature is to succinctly describe in the statute, much less identify, the misdemeanor targets who are not "liable to run" or how the Legislature is to determine, with any degree of accuracy, which Class A and B misdemeanor offenses will not involve "risky arrest warrants". To paraphrase this Court's language in *Went for It,* 515 U.S. at 633, it is hard to imagine the contours of a statute that might satisfy the lower courts on this score. Even persons charged with Class B misdemeanors may well face incarceration of up to

180 days and not less than 30 days in jail if they are repeat offenders. Tex. Penal Code § 12.43(b). Enhanced punishment of repeat offenders is applicable even if the crime charged does not involve any form of violence. *Id.*

Regardless of the nature of the crime charged, it is not reasonable to expect any bondsman to know whether an individual may face lengthy incarceration, and, therefore, choose to flee or violently resist arrest when tipped off that an arrest warrant has been issued. Further, the fact that the Harris County Sheriff's Department sends notice letters regarding outstanding warrants to certain nonviolent offenders has no bearing on the issue. Section 1704.109 is a statute with statewide applicability. As a practical matter the state legislature simply cannot be expected to craft a statute restricting solicitation of business by bail bondsmen that is more narrowly tailored than Section 1704.109 already is. Although screening targets for those who could be notified or expanding the exclusion in subsection (c) to include certain categories of Class A and B misdemeanor defendants might be marginally less intrusive, such alternatives are not workable alternatives in practice. There are simply too many variables and too much important, but usually unknown, information for these alternatives to be feasible. In any event, Petitioners submit that placing an officer's safety in the hands of bondsmen, whose primary concern is to maximize bond sales, is not a reasonable alternative. Consequently, subsection (b)(1) is not "substantially

broader than necessary" to achieve the Legislature's legitimate ends and thus it "satisfies the requirement of narrow tailoring". *Ward*, 491 U.S. at 802.

The final requirement for a time, place and manner regulation to have constitutional validity is that it leave open ample alternative channels of communication. *Id.* Although subsection (b)(1) temporarily restricts all forms of solicitation related to a specific individual with an outstanding arrest warrant unless the bail bondsman has an existing bail bond on the individual, the statute still leaves open the option to advertise generally regarding the available services of the bail bondsman. Compare *Went for It*, 515 U.S. at 633-634 (describing advertising on television and radio, on billboards, in newspapers and the Yellow Pages of telephone directories as "ample alternative channels" for receipt of information about the availability of legal representation during the 30-day blackout period after an accident).

While advertising does not allow the bondsman to target a specific individual, the Constitution does not require that persons involved in the judicial process have an unlimited right to speak about anything they wish at any time. For example, this Court has held that a lawyer could be disciplined for making statements to the press about a pending case in which he represented a criminal defendant. See *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991). The rule in question in *Gentile* was designed to protect the integrity and fairness of the state's judicial system. It imposed only narrow and necessary

limitations on lawyers' speech. The rule merely postponed the attorneys' comments until after the trial. Similarly, subsection (b)(1) simply postpones, in the interest of officer safety, a bondsman's solicitation regarding a specific individual until after the arrest warrant is executed. Clearly, the safety of arresting officers is a matter of paramount public interest and of far more importance than the need of a bondsman to employ a particular business practice for profit – even one having a measure of constitutional protection. Therefore, Petitioners submit that subsection (b)(1) of the statute is constitutional.

II. In Actions Seeking Prospective Relief, Lack Of Responsibility For An Alleged Constitutional Violation Should Be Considered A Factor Which A Court, In Its Discretion, May Deem To Be A Circumstance Which Would Render An Award Of Attorney's Fees Unjust.

This case presents an opportunity for the Court to provide guidance regarding the circumstances which would render an award of attorney's fees unjust in cases involving fee-shifting statutes. The Court first employed the phrase "unless special circumstances would render such an award unjust" in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968), an action brought under Title II of the Civil Rights Act of 1964. Although the Court said that there were no such circumstances present in that case, the Court did not explain or give examples of

what might constitute such special circumstances. After the Court decided *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), in which the Court held that only Congress, and not the courts, could authorize an exception to the "American Rule", Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559. The Act was intended to allow a court, in its discretion, to award attorney's fees to a prevailing party in suits brought to enforce certain civil rights statutes, including 42 U.S.C. § 1983. Although the text of 42 U.S.C. § 1988(b) does not specifically provide for the "special circumstances" exception recognized by the Court in *Newman*, the legislative history of the statute reflects that Congress intended such an exception to apply. See S. Rep. No. 94-1011, at 4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5912 ("It is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act. A party seeking to enforce the rights protected by the statutes covered by S. 2278, if successful, 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.'").

It is now firmly established that Section 1988(b) is to be interpreted as having a special circumstances exception. *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983). However, as noted in *Deja Vu v. Metropolitan Government*, 421 F.3d 417, 422 (6th Cir. 2005), "little guidance has been provided" by this Court "as to precisely what constitutes a special circumstance that would defeat a fee award". As a result, various

circuits employ different standards when evaluating whether special circumstances are present in a case. The Sixth Circuit has "opted for a case-by-case approach rather than adopting a 'predetermined formula' ". *Id.* The First Circuit considers factors such as whether there is a showing of "outrageous" or "inexcusable" conduct by the plaintiff or his counsel during the litigation of the case. *Williams v. Hanover Housing Authority*, 113 F.3d 1294, 1301 (1st Cir. 1997). Further, the First Circuit focuses "not on the defendants' conduct, but on the harm suffered by the plaintiffs and the relief obtained through their lawsuit". *Id.* at 1302. The Second Circuit employs a "two-step test for courts to apply when considering whether special circumstances make it appropriate to deny attorneys' fees". *Raishevich v. Foster*, 247 F.3d 337, 344-345 (2d Cir. 2001). First, a court in that circuit must make an initial determination whether the plaintiff's claim was so strong on the merits and so likely to result in a substantial judgment that counsel in similar cases could be easily and readily retained. If that requirement is satisfied, a court may then consider such factors as the award of punitive damages, the amount of the compensatory award, the degree and measurability of the harm to the plaintiff and the public interest in the particular claim. *Id.* In the Ninth Circuit the courts consider (1) whether awarding fees would further the congressional purpose in enacting the remedial statute and (2) the balance of the equities. *Abu-Sahyun v. Palo Alto Unified School Dist.*, 843 F.2d 1250, 1253 (9th Cir. 1988). The Fifth Circuit requires "*an extremely strong*

showing of special circumstances" to justify a denial of fees. *Houston Chronicle Publishing Co. v. City of League City*, 488 F.3d 613, 623 (5th Cir. 2007). However, Fifth Circuit case law tends to focus on what are not "special circumstances", rather than what would be such circumstances. See *Kirchberg v. Feenstra*, 708 F.2d 991, 998-999 (5th Cir. 1983).

In the instant case the Fifth Circuit concluded that the Petitioners "failed to make an extremely strong showing of special circumstances". *Pruett*, 499 F.3d at 417. In support of that conclusion the Court of Appeals said that not promulgating a policy "does not eliminate the cost the plaintiff had to bear in securing his rights, hence even defendants lacking culpability and acting in good faith should pay attorney's fees". *Id*. This suggests that the court equated the Petitioners' special circumstances argument with arguments made by defendants who asserted that they acted in good faith. See the court's footnote 46. However, what the district court found, in effect, was that the Petitioners had not acted at all. See Order on attorney's fees, App. 54 ("neither Harris County nor the Bail Bond Board enforced the statute against the plaintiffs"). Petitioners submit that the instant case is therefore fundamentally different from cases in which the defendant, while acting in good faith, actually violated a constitutional right.

The Harris County Bail Bond Board was made a defendant in this suit, because it is charged with the duty to enforce the provisions of Chapter 1704 of the Texas Occupations Code in Harris County. Tex. Occ.

Code Ann. § 1704.102(a). The Board is an entity created by Tex. Occ. Code Ann. § 1704.051. By statute the Board is comprised of certain specified county officials and judges, a state district judge, a licensed bail bond surety and a criminal defense attorney practicing in the county. Tex. Occ. Code Ann. § 1704.053. Harris County is simply a political subdivision of the state of Texas and has no enforcement authority with respect to the provisions of Chapter 1704.

The passage of the amendment of Section 1704.109 by the Texas Legislature in 2003, and the mere presence of the Board, did not "chill" the solicitation activities of the Respondents. It was undisputed that the Respondents continued unabated in soliciting business in open and notorious violation of the provisions of Section 1704.109 throughout the entire course of this litigation. Although the Board is vested with enforcement authority over bondsmen, the Board did not participate in the creation of Section 1704.109 and no action was taken by the Board to punish the Respondents for violating the statute. It would be wholly inequitable to award attorney's fees against a party who was not responsible for creating a state law, who did nothing to enforce the state law, and who was sued simply because of its status as the local enforcement authority under that state law. Harris County, of course, did not even have enforcement authority.

The only instances in which this Court has commented on a similar circumstance is in dicta in

Supreme Court of Virginia v. Consumers Union of United States, Inc., 446 U.S. 719 (1980) and in a footnote in *Kentucky v. Graham*, 473 U.S. 159, 164-165 n.8 (1985). In *Consumers Union* the Court said that it was "not convinced that it would be unfair" to award fees against a State Bar, which by statute was designated as an administrative agency to help enforce the State Bar Code. *Id.* at 739. This suggested that mere enforcement authority alone might support an award of attorney's fees under Section 1988(b). However, Chief Justice Burger's dissent from the denial of certiorari on the third occasion when the case came before this Court seemed to suggest that was not the Court's intent. In that opinion the Chief Justice said: "If we had thought that the mere existence of enforcement authority would support the award, there would have been no need to remand as to the Virginia Court. Thus, we necessarily remanded for further findings on the Virginia Court's actual exercise of its enforcement powers, and for consideration of whether such acts justified a fee award against the court". *Supreme Court of Virginia v. Consumers Union of United States, Inc.*, 462 U.S. 1137, 1143 (1983) (Burger, C.J., joined by Rehnquist, J., dissenting). Then, in *Graham*, the Court said it had "suggested" in *Consumers Union* "that fees could be recovered" from the court and its chief justice "in their enforcement roles", without specifically commenting as to whether enforcement authority alone would support a fee award. *Graham*, 473 U.S. at 164-165 n.8.

While it is undoubtedly true that in most instances prevailing plaintiffs are entitled to recover attorney's fees from defendants, Congress and this Court recognize an exception if awarding fees would be "unjust". Unjust in that context must necessarily refer to an award being unjust to the defendant. Obviously, it would never be unjust to the plaintiff. If the exception for special circumstances is to have any real meaning, the fact that a suit was brought against a local enforcement authority because of its status as such should be considered a factor which a court, in its discretion, may deem to be a circumstance which would render an award of attorney's fees unjust. In any other context than an action involving a First Amendment claim, the plaintiff's standing to sue would not even be recognized. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) ("there must be a causal connection between the injury and the conduct complained of – the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court'."). Therefore, Petitioners submit that when a court is exercising the discretion to award attorney's fees, focusing solely on the need to compensate private attorneys general without consideration of the defendant's actual conduct is manifestly unjust. So it is here.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

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499 F.3d 403

United States Court of Appeals, Fifth Circuit.

Carl R. PRUETT; Scott Martin,
Plaintiffs-Appellees-Cross-Appellants,

v.

HARRIS COUNTY BAIL BOND BOARD; Harris County, Defendants-Appellants-Cross-Appellees.

No. 05-20714.

Aug. 28, 2007.

David Allen Furlow (argued), Thompson & Knight, Stacy Lynn Kelly, MacIntyre & McCulloch, Houston, TX, for Pruett and Martin.

Bruce S. Powers, Asst. Cty. Atty. (argued), George Andrew Nachtigall, Houston, TX, for Harris Cty. Bail Bond Bd. and Harris Cty.

Appeal from the United States District Court for the Southern District of Texas.

ON PETITION FOR REHEARING

Before HIGGINBOTHAM, WIENER, and CLEMENT, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

In response to the Petition for Rehearing filed by the defendants, we withdraw the prior panel opinion in its entirety and substitute the following.

Two bail bondsmen challenged a Texas statute restricting solicitation of potential customers as a denial of their First Amendment rights. The district

court agreed. Concluding that all but one of the restrictions violates the bondsmen's right to commercial speech, we affirm, reverse, and remand, all in part.

I

Bail bondsmen Carl Pruett and Scott Martin filed this § 1983 action against Harris County and the Harris County Bail Bond Board,[1] challenging on various federal and state constitutional grounds, including the First Amendment, a Texas statute governing solicitation of customers, TEX. OCC. § 1704.109 (2003). That statute provides:

> (a) A board by rule may regulate solicitations or advertisements by or on behalf of bail bond sureties to protect:
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> (1) the public from:
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> (A) harassment;
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> (B) fraud;
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> (C) misrepresentation; or
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> (D) threats to public safety; or
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> (2) the safety of law enforcement officers.

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[1] The Board, a creature of Texas statute, is responsible for supervising and regulating the bond business and enforcing bond rules and statutes. TEX. OCC. § 1704.101, .102 (2005). The State of Texas declined to intervene, hence Harris County and the Board ("Harris County") defend the statute.

(b) A bail bond surety, an agent of a corporate surety or an employee of the surety or agent may not make, cause to be made, or benefit from unsolicited contact:

(1) through any means, including in person, by telephone, by electronic methods, or in writing, to solicit bonding business related to an individual with an outstanding arrest warrant that has not been executed, unless the bail bond surety or agent for a corporate surety has an existing bail bond on the individual; or

(2) in person or by telephone to solicit bonding business:

(A) that occurs between the hours of 9 p.m. and 9 a.m.; or

(B) within 24 hours after:

(i) the execution of an arrest warrant on the individual; or

(ii) an arrest without a warrant on the individual.

(c) This section does not apply to a solicitation or unsolicited contact related to a Class C misdemeanor.

The plaintiffs challenge subsection (b), which contains two prohibitions. Subsection (b)(1) prohibits any solicitation regarding an outstanding warrant, unless the subject of the warrant is a previous customer. Subsection (b)(2) restricts the time of solicitation after arrest, prohibiting solicitation in person or

by phone from 9:00 p.m. to 9:00 a.m., or within 24 hours after a person has been arrested, either with or without a warrant. The statute does not prevent attorneys, law enforcement officials, or anyone else from alerting someone that he's the subject of an open warrant. Law enforcement officials frequently send letters to petty defendants giving notice of open warrants against them, hoping they'll turn themselves in.

Bondsmen use several methods to solicit business. One particularly useful tool is the Harris County Justice Information Management System (JIMS), a computer system accessible to the public through terminals and the Internet which provides, *inter alia,* names and addresses of persons arrested and subjects of arrest warrants. Given the public's ease of access to JIMS, Harris County waits 48 hours after an arrest warrant is issued to post the information about the warrant on JIMS, allowing law enforcement officers to execute the warrant first.

The district court granted the bondsmen's motion for summary judgment, holding the statute unconstitutional and enjoining its enforcement. It granted in part the plaintiffs' motion for fees, awarding them $50,000 plus $25,000 in the event of appeal. Harris County appeals the judgment, including the award of fees, and plaintiffs cross-appeal the award of fees, asking for more.[2]

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[2] In early 2001, Harris County adopted by local rule solicitation restrictions similar to those of current § 109(b). Later that

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II

The metaphor of political speech finding its place in the marketplace of ideas proved to be a powerful if inexact force, drawing speech in its myriad presentations under the umbrella of First Amendment protection – the force of the metaphor itself a validating testament to the power of an idea so strong as to invite confusion of metaphorical imagery with defining principle. And in 1975, with the Supreme Court's decision in *Bigelow v. Virginia,*[3] speech in the marketplace of actual goods itself gained protection, albeit as "less valuable speech," termed "commercial speech." It signifies that commercial speech did not displace otherwise protected speech in gaining First

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year, the Texas legislature enacted the original version of § 109, which allowed local boards to regulate solicitation. In 2002, plaintiff Pruett challenged the local rules in state court. The trial court held the rules unconstitutional, *see Harris County Bail Bond Board v. Pruett,* No. 01-02-01043-CV, 2004 WL 2307362 (Tex.App. – Houston [1 Dist.] Oct. 14, 2004, no pet. h.), the appellate court partially reversed, 177 S.W.3d 260 (Tex.App.2005), and the case is pending before the Supreme Court of Texas. The present case involves current § 109(b), which was enacted in 2003 but concerns issues similar to those in the state court case. However, the present case involves a central issue of federal constitutional law, and although we abstain from ruling on issues of Texas constitutional law, *see Railroad Com. v. Pullman Co.,* 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), we rarely abstain from ruling on federal constitutional law, *see Pennzoil v. Texaco, Inc.,* 481 U.S. 1, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987); *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), and do not do so here.

[3] 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975).

Amendment protection. That a book or article is sold or a column is written for compensation does not eliminate its protection.[4] In sum, commercial speech, with its lesser protection, is at bottom advertising. As the parties and the court below recognized, § 1704.109 is a restriction on commercial speech.

Restrictions on commercial speech are analyzed under the framework of *Central Hudson*.[5] The

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[4] *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761-62, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976).

[5] *See Central Hudson Gas & Elec. Corp. v. Pub. Serv. Com. of New York*, 447 U.S. 557, 563-64, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). The parties quarrel about what level of scrutiny *Central Hudson* mandates. Citing *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996), the plaintiffs urge something "akin to strict scrutiny." *44 Liquormart*, however, was a plurality opinion involving "a blanket prohibition against truthful, nonmisleading speech about a lawful product," *id.* at 504, 116 S.Ct. 1495, and there's no blanket prohibition here. In any event, the Supreme Court has called *Central Hudson* a form of "intermediate" scrutiny. *See Edenfield v. Fane*, 507 U.S. 761, 767, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993); *see also Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 623, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995); *cf. Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 374, 122 S.Ct. 1497, 152 L.Ed.2d 563 (2002) (describing the test as "significantly stricter" than rational basis). The precise label for the level of scrutiny embodied in *Central Hudson* is irrelevant, however – we just apply the test. Likewise, the plaintiffs' assertion that the *Central Hudson* test isn't the same as the time, place, and manner test, while true, *see Speaks v. Kruse*, 445 F.3d 396, 400 n. 10 (5th Cir.2006), is axiomatic.

The plaintiffs also suggest that strict scrutiny should apply because the restrictions here are content-based. This argument

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government may ban misleading commercial speech and commercial speech related to illegal activity. "If the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed."[6] First, "[t]he State must assert a substantial interest to be achieved by restrictions on commercial speech."[7] Second, "the restriction must directly advance the state interest involved."[8] Third, "if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive."[9] We review the lower court's application of this test *de novo*.[10]

Before we apply *Central Hudson* to the two restrictions at issue, we address a fundamental dispute coloring much of the parties' arguments and the lower court's ruling. The plaintiffs argue that only evidence created before enactment of § 1704.109 and relied upon or cited by the legislature in passing it

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has no merit – § 1704.109 is a classic restriction on a category of commercial speech, a restriction that involves methods, times, and subjects of solicitation and does not have as a goal the suppression of speech. *See, e.g., Speaks,* 445 F.3d at 400 (examining similar restriction on chiropractor solicitation as a restriction on commercial speech).

[6] *Central Hudson,* 447 U.S. at 564, 100 S.Ct. 2343.

[7] *Id.*

[8] *Id.*

[9] *Id.* Despite the language of the third prong, the Supreme Court and, thus, this court do not require that the state use the least-restrictive means. *See, e.g., Speaks,* 445 F.3d at 401 n. 14.

[10] *See Speaks,* 445 F.3d at 399.

can be considered under *Central Hudson*. Consequently, they argue, because the legislative record behind § 1704.109 is bare, it cannot survive scrutiny. Harris County disagrees, offering testimony and affidavits introduced in the court below and arguing that *Moore v. Morales*[11] relied upon testimony at trial in ascertaining the justification for a statute. The district court agreed with the plaintiffs, although it held that § 1704.109 failed scrutiny even considering Harris County's additional evidence.

Central Hudson does not require that evidence used to satisfy its strictures exist pre-enactment. Plaintiffs rely heavily on the statements in *Edenfield v. Fane* that a statute cannot be justified "by mere speculation or conjecture" and that "the *Central Hudson* standard does not permit us to supplant the precise interests put forward by the State with other suppositions."[12] Those statements, however, only distinguish between rational basis review, under which a court can, and should if necessary, confect its

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[11] 63 F.3d 358, 362-63 (5th Cir.1995). Harris County also relies on *BGHA, LLC v. City of Universal City, Texas*, 340 F.3d 295, 299 (5th Cir.2003) (discussing *J&B Entertainment, Inc. v. City of Jackson*, 152 F.3d 362, 371 (5th Cir.1998), which allowed the city to justify an ordinance based on evidence adduced at trial).

[12] 507 U.S. 761, 768, 770, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993); *see also Went for It*, 515 U.S. at 624, 115 S.Ct. 2371 (quoting *Edenfield*). The plaintiffs cite to other cases, like *U.S. West, Inc. v. F.C.C.*, 182 F.3d 1224 (10th Cir.1999), which simply restate this rule.

own reasons to justify a statute, and *Central Hudson* review, under which a court can consider only the reasons proffered by the state. While with commercial speech the state need not demonstrate that its regulatory means were the least intrusive on protected speech,[13] it must at least articulate regulatory objectives to be served. But that doesn't mean the state can proffer only reasons locatable in the legislative record. Indeed, in *Moore,* our most relevant case, the court's language shows that it considered post-enactment evidence in analyzing a *Central Hudson* claim.[14] Even with a First Amendment doctrine calling for "intermediate scrutiny" such as regulation of sexually-oriented businesses, where the argument to disallow post-enactment evidence as justification for a statute has some logical purpose, we have specifically rejected the plaintiffs' contention that evidence of purpose must be drawn only from a contemporaneously generated legislative record. And there the threshold question is whether the legislative body is regulating protected activity or its

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[13] *See supra* note 6.

[14] 63 F.3d 358, 362-63 (5th Cir.1995) (stating "[b]efore us is extensive evidence" and, twice, "[t]hey testified"). In their brief, plaintiffs suggest that this "evidence" and "testimony" was actually pre-enactment "evidence" and "testimony," presumably created in connection with the legislation itself. The district court's ruling, however, makes clear that the evidence was developed at trial. *See Moore v. Morales,* 843 F.Supp. 1124 (S.D.Tex.1994).

effects.[15] We consider the testimony and affidavits introduced by Harris County in the court below, as the district court did in the alternative.

A

We turn first to subsection (b)(1), which prevents solicitation regarding outstanding warrants unless the bondsman has a prior relationship with the party. Harris County concedes that the solicitations at issue are neither deceptive nor relate to illegal activity. Next, under the first prong of *Central Hudson,* Harris County asserts as substantial interests the diminishment of: 1) the flight risk for felony offenders and high-level misdemeanor offenders; 2) the risk of harm to officers, defendants, and bystanders when such defendants are arrested; 3) the risk of harm to victims, family members, or witnesses from retribution;

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[15] *See Illusions-Dallas Private Club, Inc. v. Steen,* 482 F.3d 299 (5th Cir.2007) (rejecting argument that legislative record or statutory preamble was necessary to discern a content-neutral purpose for statute); *J&B Entm't, Inc. v. City of Jackson,* 152 F.3d 362, 371 (5th Cir.1998) (allowing use of evidence of secondary effects developed pre-enactment or adduced at trial). Plaintiffs cite other cases that seem to disagree, *see Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County,* 337 F.3d 1251, 1265-67 (11th Cir.2003); *Hickerson v. City of New York,* 146 F.3d 99, 105 (2d Cir.1998); *11126 Baltimore Blvd. v. Prince George's County,* 886 F.2d 1415, 1423 (4th Cir.1989), *judgment vacated by*496 U.S. 901, 110 S.Ct. 2580, 110 L.Ed.2d 261 (1990); *SOB, Inc. v. County of Benton,* 317 F.3d 856, 862 (8th Cir.2003); *D.H.L. Associates v. O'Gorman,* 199 F.3d 50, 57-58 (1st Cir.1999), but those cases aren't controlling, of course.

and 4) the potential for destruction of evidence, interests alluded to in the statute itself.[16] The district court found that these interests were substantial. We agree, although to the extent that Harris County itself notifies non-serious offenders of open warrants against them – and the evidence shows that Harris County does this regularly[17] – the interests are not substantial at all. Deferring that concern to the third prong, where it more easily fits, and assuming the interests are substantial in the abstract, we turn to the second prong.

Under the second prong, Harris County must show that (b)(1) directly advances these interests. Witnesses for Harris County testified that executing arrest warrants is dangerous, that maintaining the "element of surprise" is important in decreasing the target's ability to flee, resist, harm people, or destroy

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[16] The plaintiffs argue that the legislature's purpose in enacting § 109 was to hinder competition between large, affiliated bondsmen and independent bondsmen, but their evidence largely relies upon claims that the legislature responded to strong anti-competitive lobbying by Pruett's and Martin's competitors, International Fidelity Insurance Company. In any event, even if the impulses behind § 109 were anti-competitive, § 109 could still be supported by other, legitimate interests.

[17] *See, e.g.*, Affidavit of Sergeant Larry Hall. (Hall, employed by the Harris County Sheriff's office since 1976, described the County's notification policy, which allows the County to "wean out possibly dangerous misdemeanants and send notification letters only to non-threatening, non-serious misdemeanants who are likely to save Harris County money and serve public policy by voluntarily coming in and making appropriate arrangements. . . .")

evidence, and that bondsman solicitation has, in certain past anecdotal incidents, tipped off criminals and caused problems.[18] Although other Harris County witnesses testified that they knew of no instances where bondsman solicitation had caused a problem, and the bondsmen's main expert witness testified similarly, we accept as true the testimony supporting the County, given the procedural posture of this case. We note, however, that the record does not indicate the date of many of the incidents described and fails to reflect, in several instances, which incidents occurred before institution of the 48-hour JIMS window. At least one anecdote, however, references an individual suspected of manufacturing methamphetamine who had received a tip that he would be arrested and opened fire on police officers when they arrived to arrest him in 1988.[19] Presumably such a

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[18] *See, e.g.*, Oral Deposition of Alvin W. Berry ("The element of surprise . . . does not give the defendant or the person to be arrested the ability to either flee or to resist."); Affidavit of James Fitzgerald (describing how a murder suspect fled after receiving solicitation from a bondsman and was missing for about six days before being apprehended); Affidavit of Rodney Marcotte ("[A]fter apprehending suspects, they have indicated to me that they fled immediately after receiving notice of solicitation by one or more bondsmen."); Affidavit of Sergeant Kent Radney (describing how a suspect, aware that he would be arrested, greeted police officers with open fire).

[19] Cross-Examination of Bruce Douglas Carr, discussing how the incident discussed in Sergeant Radney's affidavit occurred in 1988, prior to the implementation of JIMS. *See also* Affidavit of Kent Radney (describing the gun battle, which occurred in October 1988).

suspect would be targeted, and hopefully caught, within the 48-hour period preceding posting on JIMS. Nevertheless, we accept at this point that (b)(1) directly advances the state's interests.[20]

However, even assuming that (b)(1) advances the stated interests, (b)(1) fails prong three of *Central Hudson*. While that prong does not require that the state employ the least-restrictive means to accomplish its goals,[21] it does require a good fit between the means and the goals. Consequently, in determining whether "the means are in proportion to the interests they purport to serve,"[22] it is relevant that other,

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[20] The bondsmen also argue that (b)(1) does not directly advance the stated interests because it excludes bondsmen with an "existing business relationship." Essentially, they argue that (b)(1) does not go far enough and should not have this exclusion, as some of their witnesses testified. This argument sounds in underinclusivity, and thus may relate more properly to prong three, but in any event we agree with the court in *Harris County Bail Bond Board v. Pruett*, 177 S.W.3d 260, 273-74 (Tex.App.2005), that this exception is not problematic. First, that court construed "existing business relationship" to mean that "the bondsman involved has in place an existing, current bond on the person requiring another bond." That definition controls here. As the court noted, such a bondsman would want to contact the person because the new warrant might affect his current bond. Moreover, as the court noted, it would be impractical to allow the bondsman to discuss the existing bond but not the possibility of a new bond, and it is unlikely a bondsman would contact someone who he thought would run away because that might lead to forfeiture of the original bond.

[21] *See supra* note 9.

[22] *See Speaks v. Kruse*, 445 F.3d 396, 400 (5th Cir.2006).

less-restrictive and more-tailored means exist. The district court found that Harris County could advance the stated interests by the more narrow means of: 1) increasing the number of officers executing warrants, thereby arresting risky offenders before the 48-hour JIMS window expires; 2) extending the 48-hour window; and 3) screening targets for those who could be notified. The County complains that the first two alternatives are impractical and the third outside the Texas legislature's control. The first may be impractical. But the second is not, in the district court's form or in the form we address – wherein the legislature could alter § 109 to include a time limit on solicitation, with a window prior to solicitation that would give police officers time to act.[23] And here, we note that restrictions on commercial speech without any time limitation are inherently suspect.[24] Furthermore,

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[23] After all, whether Harris County could extend the 48-hour JIMS blackout period is irrelevant. The question is whether § 109 is constitutional as written; indeed, other counties may not have a JIMS-type system at all. We, and the Supreme Court, often assume in analyzing whether statutes pass constitutional muster that the legislature could enact a more narrowly tailored means. *See, e.g., Riley v. Nat'l Federation of the Blind of N.C., Inc.*, 487 U.S. 781, 800, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988) ("In contrast to the prophylactic, imprecise, and unduly burdensome rule the State has adopted to reduce its alleged donor misperception, more benign and narrowly tailored options are available."); *Lindsay v. San Antonio*, 821 F.2d 1103, 1110-11 (5th Cir.1987) ("For purposes of this opinion, we can assume, *arguendo*, that the traffic safety interest could be furthered by means of a more narrowly tailored ordinance.")

[24] *See Speaks v. Kruse*, 445 F.3d 396, 400-01 (5th Cir.2006).

some of the County's own witnesses testified that giving law enforcement 72 or 96 hours or so after arrest to serve a warrant before bondsmen could solicit would greatly serve the County's stated interest.[25] In short, (b)(1) is not narrowly tailored because it prohibits solicitation of targets days, weeks, or even months after warrants are issued.

Furthermore, we agree with the district court that it is telling that Harris County itself, through the Sheriff's Department, notifies thousands of people every year of open warrants against them,[26] as do other law enforcement agencies in the County[27] –

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[25] Of course, the witnesses were asked whether extending the 48-hour JIMS period would help, but exactly why a blackout of a certain length might exist is irrelevant.

[26] In 2002, a Sheriff's Department Sergeant testified that five night-clerks in the Warrants Division send "more than 20" and perhaps as many as 100 of those letters every night, yielding 7,300 to 36,500 a year. We recognize the tension in our holding that what the Texas legislature, not Harris County, can do regarding a time limit is relevant, but also looking to whom Harris County notifies. We look to what Harris County does only to illuminate why it is possible for the statute itself to screen certain targets more finely than the Class C misdemeanor exclusion that it currently contains.

[27] Harris County Constables notify many Class C misdemeanor targets, who are exempted from § 109. The bondsmen introduced evidence from the constables' websites suggesting that they notify certain Class A and B misdemeanor targets as well, and this appears to be true, although the evidence isn't entirely clear. It's undisputed that the Houston Police Department notifies certain targets, although it's unclear what categories of targets, and does not apprise the Sheriff's Department of whom it notifies. In addition, anyone can call the county clerk

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Harris County cannot give such notice itself and then claim that restricting notice by others is necessary to the safety of its officers and the public and the prevention of flight. The County urges that it notifies only people charged with "non-serious" misdemeanors, excluding people accused of assaultive crimes, crimes involving family violence, crimes against the person, or any crime of an aggravated nature. The record reveals that the Sheriff's Department does not notify people in this excluded group of assaultative crimes, or people charged with felonies, wanted for revocation of weekend service or off-work hours, wanted for sentencing, wanted for capias profine that includes jail time, or wanted in another jurisdiction.[28] Yet through that screen still fall many Class A and Class B misdemeanor targets, who escape the Class C misdemeanor exclusion of § 109, including oft-sought targets of bondsmen solicitation like petty thieves, people who write hot checks, drivers on suspended licenses, and certain DWI offenders. Harris County urges that the statute's exclusion of only Class C misdemeanor targets is reasonable because certain

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and ask whether a warrant exists for someone, and various agencies release names and data through posters, press releases, and broadcast media outlets, but these forms of notification seem less relevant because anyone who cares to find out if he has a warrant is not the type of person about whom Harris County professes concern, and because agencies' publicizing information about certain targets occurs, presumably, after they have tried to catch a target and he has become a fugitive.

[28] Also excluded from receiving notification are those with an unknown name, address, or other personal information.

Class A and Class B misdemeanors can result in jail of up to 180 or 360 days, even if they are non-violent, rendering the suspects of such crimes liable to run. That may be true, and we do not cast the legislature's choice to exclude only Class C misdemeanors as unreasonable. However, under the narrow-tailoring test of *Central Hudson* we note that, as Harris County has done, (b)(1) could reasonably allow solicitation of certain Class A and B misdemeanor targets, those not liable to run. Combined with its temporal breadth, the breadth of crimes covered by (b)(1) is simply too broad. We do not hold that Harris County cannot serve its objectives by more narrowly drawn means. Rather, we hold that Harris County has not yet engaged in the narrow tailoring demanded by the First Amendment.

B

We turn next to subsection (b)(2), which prevents solicitation in-person or by phone between 9:00 p.m. and 9:00 a.m. and within 24 hours after arrest. Harris County contends first that (b)(2)(A) regulates conduct that was already unlawful under the general statute prohibiting solicitation between 9:00 p.m. and 9:00 a.m. and before noon on Sundays, TEX. BUS. & COM. CODE § 37.02(a)(2), hence under the threshold inquiry of *Central Hudson*, (b)(2)(B) survives as a ban

on speech relating to illegal activity.[29] This bootstrapping argument fails. The threshold inquiry asks whether the speech is misleading or the product or service spoken about is illegal, and here the speech isn't misleading and the product or service itself – bail bonding – isn't illegal. That § 37.02(a)(2) itself bans speech doesn't save (b)(2)(B). And so we turn to the *Central Hudson* prongs.

Harris County asserts as its substantial interest for (b)(2) the prevention of harassing solicitation, essentially what we have elsewhere called the interest of "privacy," a sufficient interest.[30] But Harris County's argument finds difficulty when its interest is stated more narrowly as the prevention of harassment through bail solicitation and the promotion of privacy of families of persons targeted for arrest. It now differs from solicitation held to be a valid target of legislation.[31] We defer this concern to the next

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[29] In analyzing the second prong on *Central Hudson,* the district court concluded that § 37.02(a)(2) covers only solicitations of a "consumer good or service," and that bail bonding isn't such a good or service. Although we don't pass on the question, we note that § 37.02(a)(2) seems to cover bail bonding, as the Texas Court of Appeals held in Pruett's related case, *see Harris County Bail Bond Board v. Pruett,* 177 S.W.3d 260, 275-76 (Tex.App.2005).

[30] *See Speaks,* 445 F.3d at 400 n. 13.

[31] *See, e.g., id.,* at 400 n. 13, 398-99 (discussing how "[p]rivacy and the protection of citizens against undue influence are valid substantial state interests" but striking down a Louisiana statute preventing direct solicitation of recent accident

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prong, again assuming the interests are substantial in the abstract.

We conclude that the 24-hour window of (b)(2)(B) does not directly advance the state's interest. Harris County offers an affidavit from an employee of the Harris County District Attorney's Office, Kathleen Braddock, stating that the 24-hour period after arrest is the time during which harassing bond solicitations are the worst and that citizen complaints "declined drastically" after Harris County changed its local rules, before the enactment of § 109, to contain essentially what is now § 109. It also offers testimony from four citizens upset at solicitation calls they received. This is insufficient evidence to show that the 24-hour rule directly advances state interests. First, Harris County does not connect the reduction in citizen complaints to the 24-hour rule, as opposed to the other aspects of the amended local rules, particularly the nighttime solicitation ban that we uphold later.[32] Indeed, Braddock's affidavit in the paragraph discussing the 24-hour ban highlights the harassing nature of calls between, especially, midnight and 5 a.m., and three of the four citizens who testified regarding the 24-hour period stated that they received the unwelcome calls between 9 p.m. and

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victims by health care providers as insufficiently narrowly tailored).

[32] Harris County provides no evidence about the nature of the complaints' pre- and post-rule change, preventing any useful conclusion from the reduction in complaints.

9 a.m.[33] We hold later that Harris County can ban such nighttime calls. Second, to whatever extent the testimony of the citizens can be read to cover daytime solicitation, we give credence to the common-sense argument that most families would like to know when their members are in jail.[34] Third, Braddock's conclusory statement that solicitation is the worst in the 24-hour period after arrest is insufficient. Notably, the district court held that Harris County fails to explain why, with the implementation of a 24-hour rule, harassing solicitations won't simply begin on the 25th hour. Harris County now offers an explanation which it urges is implicit in Braddock's statement that most harassing solicitation occurs during the first 24 hours following arrest: most people who can afford bond will seek out a bondsman during the first 24 hours, hence bondsmen will have little incentive to call after that period. Even if true, it is no response to an attack on a restriction on speech that the

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[33] The record does not show when the fourth citizen received the unwelcome call.

[34] Harris County presents evidence to the contrary, where individuals argue that they prefer to receive news about a family member being in jail from another family member. Additionally, Harris County argues that many detained suspects are permitted to make a telephone call to family members. Other evidence, however, such as the testimony of criminal defense attorney Albert Fong, suggests that the many people who are contacted by bondsmen regarding a relative in jail have expressed "gratitude" rather than indignation upon receiving this information. Regardless, this is not the crux of our argument, as we focus on the 24-hour window's effect of stifling an unacceptably large proportion of bondsman speech.

restriction essentially bans all speech. The argument that most bondsmen desire to contact potential customers right away helps explain why solicitation soon after arrest might be prevalent, and therefore harassing, but it also counsels that such a restriction, which prevents speech when it is the most valuable for the speaker and the potential customer,[35] should be viewed with some skepticism. Given the record as a whole, we cannot conclude that Harris County has shown that the 24-hour ban directly serves the interest in privacy.

All that remains is the 9:00 p.m. to 9:00 a.m. restriction. The district court struck that down with the rest of § 109(b), but its rationale for doing so is unclear, although the court seemed to rely partly on its conclusion that the general solicitation timing statute, § 37.02(a)(2), didn't apply to bail bonding. We don't decide that question,[36] although we note that if § 37.02(a)(2) covers bail bonding, then presumably we can't strike down (b)(2)(A) without striking down § 37.02(a)(2), at least "as applied" to bail bonding. We don't face that dilemma because we conclude that (b)(2)(A) survives *Central Hudson* scrutiny. Prohibiting in-person and telephone solicitation at late hours directly and substantially furthers privacy and the prevention of harassing solicitation, and is narrowly

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[35] The benefits attending commercial speech flow not just to the speaker, for increased consumer knowledge about any product aids consumer choice and increases competition.

[36] *See supra* note 26.

tailored to furthering that goal. A nighttime prohibition is inevitably underinclusive because privacy may be lost and harassing solicitation made during the day, but surely the state's interest is more powerful at night. Indeed, we've found no successful challenges to general nighttime solicitation bans.

III

The plaintiffs also attacked § 109 below on vagueness, equal protection, and Texas law grounds. The district court never addressed these arguments after concluding that § 109 violated the First Amendment. The plaintiffs raise the vagueness and equal protection challenges again on appeal. Hence we must address the vagueness and equal protection arguments as they pertain to (b)(2)(A), the subsection of § 109 most resistant to those arguments. First, (b)(2)(A) is not unconstitutionally vague; two specific types of solicitation of a specific service are banned during a specific time.[37] Second, the plaintiffs' equal protection argument relies entirely on the distinction in (b)(1) between bondsmen with existing client relationships and bondsmen without such relationship – a distinction irrelevant to (b)(2)(A).

Consequently, we affirm the district court's grant of summary judgment to plaintiffs, except for that

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[37] *See Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982).

part enjoining the enforcement of (b)(2)(A), which we reverse.

IV

After addressing the merits, the district court ordered the bondsmen to file a request for fees, pursuant to 42 U.S.C. § 1988. The bondsmen requested almost $200,000. The defendants argued that "special circumstances" should preclude or reduce any award,[38] and they also attacked specific line-items submitted by the bondsmen. The court took no issue with the line-items, but it noted its concern with whether any award should issue given that "(a) Harris County is not involved in the regulation of bail bondsmen; (b) the Harris County Bail Bond Board is not a policy making body; it merely enforces the laws and policies of the state of Texas; and (c) neither Harris County nor the Bail Bond Board enforced the statute against the plaintiffs." The court then awarded what it called "nominal" fees, $50,000, with $25,000 more in the event of appeal. In its August 18, 2005 notice of appeal, Harris County appealed both the underlying merits and the award of fees, urging

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[38] *See Houston Chronicle Pub. Co. v. City of League City, Tex.*, 488 F.3d 613, 623 (5th Cir.2007) (explaining the "special circumstances" exception of *Hensley v. Eckerhart*, 461 U.S. 424, 429, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) (quoting a Senate Report behind § 1988 that "a prevailing plaintiff 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust' ")).

again that "special circumstances" exist precluding any award of fees. After later, unsuccessful attempts to modify that award, the plaintiffs cross-appealed the issue of fees, asking that we award more money or remand with instructions to award more money because the court's three findings quoted above were erroneous.

At the outset, the parties skirmish over whether the bondsmen's cross-appeal was timely.[39] We need not address this issue because Harris County's appeal, including an appeal of fees awarded, was timely, and that appeal focused on the same question – whether and to what extent the district court could consider the fact that defendants were not the promulgator, or arguably the enforcer,[40] of the statute at issue.

We review a district court's determination of special circumstances for abuse of discretion;[41] although this is a highly deferential standard of review, we find here that because plaintiffs fully succeeded in the case below,[42] the court's award of "nominal"

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[39] *Browder v. Director, Dep't of Corrections,* 434 U.S. 257, 264, 98 S.Ct. 556, 54 L.Ed.2d 521 (1978) (holding that a timely notice of appeal is jurisdictional).

[40] The parties dispute whether defendants did, or were about to, enforce § 109 against them.

[41] *Johnson v. Mississippi,* 606 F.2d 635, 637 (5th Cir.1979).

[42] The district court declared § 109 unconstitutional, found that defendants were liable under § 1983 for "depriving plaintiffs of their constitutional rights," and enjoined defendants from

(Continued on following page)

attorneys' fees to plaintiffs based on defendants' lack of participation in policymaking or regulation of bondsmen was an erroneous interpretation of the special circumstances that the Court in *Hensley*[43] indicates could render an award unjust.

We have held that given the strong policy behind § 1988 of awarding fees to prevailing plaintiffs, defendants must make an "extremely strong showing" of special circumstances to avoid paying attorneys' fees[44] and that "the discretion to deny § 1988 fees is . . . extremely narrow."[45] That a defendant does not promulgate a policy does not eliminate the costs the plaintiff had to bear in securing his rights, hence even defendants lacking culpability and acting in

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enforcing the statute. The only point on which the court disagreed with plaintiffs was on their request for damages; it granted an injunction in lieu of damages. The court also declined to address plaintiffs' alternative claims, since it found the statute unconstitutional under their First Amendment claim.

[43] Defendants relied on the *Hensley* case in their response to plaintiffs' motion for attorneys' fees, arguing that "'special circumstances . . . would render . . . an award [of attorney fees and costs] "unjust."'" Defendants Harris County Bail Bond Board's Response to Plaintiffs' Motion to Recover Attorney Fees, Expert Fees and Expenses (citing *Hensley* 461 U.S. at 429, 103 S.Ct. 1933 (1983)).

[44] *See Houston Chronicle Pub. Co. v. City of League City, Tex.*, 488 F.3d 613, 623 (5th Cir.2007).

[45] *Espino v. Besteiro*, 708 F.2d 1002, 1005 (5th Cir.1983) (citing *Ellwest Stereo Theatre, Inc. v. Jackson*, 653 F.2d 954, 955 (5th Cir.1981)).

good faith should pay attorneys' fees.[46] Defendants here failed to make an extremely strong showing of special circumstances. Even if defendants had made an extremely strong showing that rose to the level of special circumstances, this circuit has never held that such "special circumstances" can serve to reduce, and not fully eliminate, an award of fees.[47]

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[46] *See Hopwood v. State of Texas,* 236 F.3d 256, 278 (5th Cir.2000) (noting that § 1988 provides fees under a "private attorney general theory"); *Williams v. Hanover Hous. Auth.,* 113 F.3d 1294, 1301-02 (1st Cir.1997) ("The circuits are in agreement . . . that defendants' good faith reliance even on settled law . . . is not a 'special circumstance' warranting a denial of attorneys' fees under § 1988."); *Lampher v. Zagel,* 755 F.2d 99, 104-05 (7th Cir.1985) (holding that defendants' "good faith" is not sufficient and that local official's enforcement of state law he thought valid was not sufficient); *Martin v. Heckler,* 773 F.2d 1145, 1149-52 (11th Cir.1985) (concluding that state agency which merely enforced federal law and did not write policy failed to present "special circumstances" to justify denial of all fees). In essence, as long as a plaintiff's lawsuit played some role in his eventually obtaining relief – as opposed to, say, a defendant who gratuitously confers relief – he can recover fees. *See Lampher,* 755 F.2d at 104-05.

[47] We find only one case, from the Third Circuit, that has allowed a partial reduction of fees in lieu of all-out elimination of fees under the special circumstances test; the court wrote this opinion directly after the *Hensley* decision, when few other interpretations of that case were available. *See Inmates of Allegheny County Jail v. Pierce,* 716 F.2d 177, 179 (3d Cir.1983) ("[W]e note that *Hensley* was announced after the filing of the district court opinion in the instant case so that the court below did not have the benefit of the Supreme Court's latest teachings.")

The district court would have had more discretion to reduce the County's attorneys' fees in the case below if plaintiffs had partially rather than fully succeeded on their claims,[48] as they have on appeal. Under *Hensley*'s standard for partial success (a different standard than the "special circumstances" that occasionally allow a defendant to avoid attorneys' fees altogether), a court may award reduced fees to plaintiffs that are prevailing parties but have lost on some claims.[49] The court may use its "equitable discretion" to "arrive at a reasonable fee award, either by attempting to identify specific hours that should be eliminated or by simply reducing the award to account for the limited success of the plaintiff."[50] Plaintiffs did not have "partial success" in the district

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[48] *See supra* note 42, discussing plaintiffs' success on all claims with the minor exception of the court's decision to grant an injunction, not damages. Even if the court, in its discretion, had considered this minor exception as a "failure" on a claim, the court did not conduct the correct *Hensley* analysis for partial success but rather (it appears) relied more generally on the special circumstances exception to substantially reduce the award. Additionally, even if the court had conducted a *Hensley* analysis for partial success, plaintiffs would likely have merited a full fee award under the applicable *Hensley* test because plaintiffs soundly won the majority of their claims. *See Hensley*, 461 U.S. at 440, 103 S.Ct. 1933 ("Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised.")

[49] *Hensley*, 461 U.S. at 436, 103 S.Ct. 1933.

[50] *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 789-90, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989), (citing *Hensley*, 461 U.S. at 437, 103 S.Ct. 1933).

court, however; they won their case yet they received nominal fees.

Because the court erred in applying the special circumstances test in the case below, and because Harris County has now prevailed on one issue, we must vacate and remand the award of fees to allow the district court to award fees appropriate to plaintiffs' now partial success in both the district court as well as on appeal.[51]

We AFFIRM IN PART and REVERSE IN PART the district court's decision on the merits. We VACATE AND REMAND the district court's award of fees for further consideration.

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[51] *See Hensley*, 461 U.S. at 435, 103 S.Ct. 1933 (explaining that, under § 1988, a party cannot recover fees for legal services on unsuccessful claims, although sometimes unsuccessful and successful claims can be so related as to warrant fees for time spent on the combined claims).

400 F.Supp.2d 967

United States District Court, S.D. Texas,
Houston Division.
Carl R. PRUETT and Scott Martin, Plaintiffs,
v.
THE HARRIS COUNTY BAIL BOND BOARD
and Harris County Defendants.
No. CIV.A. H-03-3241.

May 20, 2005.

David A. Furlow, Thompson & Knight LLP, Houston, TX, for Plaintiffs.

George A. Nachtigall, Deputy Chief Trial Division, Houston, TX, for Defendants.

HOYT, District Judge.

I. INTRODUCTION

Pending before this Court are the plaintiffs' motion for summary judgment and the defendants' cross motion for summary judgment. This suit concerns the constitutionality of a Texas state law, TEX. OCC. § 1704.109, that forbids certain solicitations by bail bondsmen. The plaintiffs, Carl Pruett and Scott Martin, are bail bondsmen whose practices conflict with the recently enacted statute. They have challenged section 1704.109 on multiple Federal and state constitutional grounds, and have brought a claim for relief under 42 U.S.C. §§ 1983 and 1988. The defendants, the Harris County Bail Bond Board and Harris County, defend the state statute in lieu of the Texas

Attorney General, who declined to intervene in this case.

Procedural History

The plaintiffs filed the original complaint on August 13, 2003. This Court denied the plaintiffs' motion for temporary restraining order, preliminary injunction, and declaratory judgment on October 27, 2003. On December 22, 2003, this Court denied a motion to intervene filed by International Fidelity Insurance and Allegheny Casualty, a ruling affirmed on appeal to the Fifth Circuit. The parties filed the instant motions for summary judgment on September 20, 2004. After considering the motions, responses, the pleadings, and the applicable law, this Court determines that the plaintiffs' motion should be GRANTED in part and DENIED in part, and the defendants' motion DENIED in its entirety.

II. FACTUAL BACKGROUND

The plaintiffs are agents of corporate bail bond sureties whose methods of practice conflict with section 1704.109 of the Bail Bond Act. TEX. OCC. § 1704.109. Harris County, is a political subdivision of the State of Texas and the Harris County Bail Bond Board ("the Board"), created by Texas statute, is a body comprised of thirteen members. While neither defendant participated in the creation or enactment of section 1704.109, the Board is vested with enforcement authority. *Id.* at § 1704.103. The Legislature

passed section 1704.109 in June 2001, and it provides as follows:

> (a) a board by rule may regulate solicitations or advertisements by or on behalf of bail bond sureties to protect;
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> (1) the public from:
>
> (A) harassment;
>
> (B) fraud;
>
> (C) misrepresentation; or
>
> (D) threats to public safety; or
>
> (2) the safety of law enforcement officers.
>
> (b) A bail bond surety, an agent of a corporate surety, or an employee of the surety or agent may not make, cause to be made, or benefit from unsolicited contact:
>
> (1) through any means, including in person, by telephone, by electronic methods, or in writing, to solicit bonding business related to an individual with an outstanding arrest warrant that has not been executed, unless the bail bond surety or agent for a corporate surety has an existing bail bond on the individual; or
>
> (2) in person or by telephone to solicit bonding business:
>
> (A) that occurs between the hours of 9 p.m. and 9 a.m.; or

(B) within 24 hours after:

(i) the execution of an arrest warrant on the individual; or

(ii) an arrest without a warrant on the individual.

(c) This section does not apply to a solicitation or unsolicited contact related to a Class C misdemeanor.

Id.

Subsection (a) of the statute vests authority in the Board to further regulate on the basis of certain stated objectives, while subsection (c) excludes class C misdemeanors (relatively small offenses punishable by fine only). The plaintiffs challenge subsection (b) of the statute, which concerns unsolicited bail bondsman contact.

Subsection (b)(1) (hereinafter "the unexecuted warrant rule") prohibits bail bond agents[1] from soliciting, through "any means," business regarding an unexecuted (i.e., outstanding) arrest warrant. The statute provides an exception, however, for any agent who has an existing bail bond on the individual. On the other hand, subsection (b)(2) (hereinafter "the 24-hour rule") restricts the time during which an agent may solicit bail bond business after an arrest has

[1] Although the statute refers to "a bail bond surety, an agent of a corporate surety, or an employee of the surety or agent," for simplicity the Court will simply use the term "agent."

been made. It prohibits solicitations "in person or by telephone" that occur between the hours of 9:00 p.m. and 9:00 a.m., or within 24 hours after an individual has been arrested. The 24-hour rule contains no exception for bail bondsmen with existing bail bonds on an individual. Hence, a bondsman violates section 1704.109 by making phone calls on unexecuted arrest warrants within the prohibited time windows.

Bail bondsmen use many methods to solicit business, and a given bail bondsman may utilize any combination of methods for solicitation. One particularly useful tool for soliciting bail bond business is the Harris County Justice Information Management System ("JIMS"). JIMS gives speedy access to names and addresses of arrestees and subjects of warrants. As a result, Harris County delays by 48 hours the posting of information on an individual subject to an arrest warrant, allowing law enforcement officers an opportunity to execute the warrant. The information in JIMS is public information.

The statute, however, does not prevent attorneys or law enforcement officials from alerting an individual to the fact that he is the subject of an arrest warrant. Thus, attorneys and law enforcement officials may send letters notifying an individual of an outstanding warrant. In addition, law enforcement officials may issue press releases announcing the issuance of arrest warrants. Because the information in JIMS is public and the statute applies only to bail bondsmen, any individual, including a lawyer, could obtain information about unexecuted warrants and

gratuitously notify the subject without violating the statute.

No legislative history accompanies section 1704.109, and the parties have sought to create a record primarily through affidavits. The defendants admit that they have no actual knowledge of any information that the Legislature relied upon when it enacted section 1704.109. The defendants, however, proffer complaints filed with the Board that they readily admit may not have been before the Texas Legislature. The complaints pertained to bail bondsmen making phone calls in the late night/early morning hours and bail bondsmen calling the subjects of unexecuted warrants "tipping" them off. Arguably, this permitted the subject to flee or potentially harm others. Nevertheless, the complaints led the Board to adopt Local Rules 24 and 25, which share many similarities with section 1704.109.[2]

III. CONTENTIONS OF THE PARTIES

The plaintiffs have sued the defendants claiming that section 1704.109 violates a litany of state and federal constitutional provisions, including the First, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 3, 8, 11, 13, 19 and 29 to the Texas Constitution.[3]

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[2] Texas courts reviewed the local rules. *See* footnote 3, infra.

[3] The Court is aware of the state court ruling in *Harris County Bail Bond Bd. v. Pruett*, No. 01-02-01043-CV, 2004 WL

(Continued on following page)

Specifically, under the United States Constitution, the plaintiffs contend that the statute violates their free speech rights under the First Amendment. In the alternative, the plaintiffs contend that the statute is void for vagueness under the First and Fourteenth Amendments, that it violates Equal Protection principles and that it abridges the plaintiffs' and their customers' right to counsel under the Sixth Amendment and their right to be free from excessive bail under the Eighth Amendment. The plaintiffs also seek injunctive relief for the violation of their civil rights pursuant to 42 U.S.C. § 1983 and for attorney fees pursuant to 42 U.S.C. § 1988.

IV. STATEMENT OF THE LAW

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories and admissions

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2307362 (Tex.App. – Houston [1 Dist.] October 14, 2004, no pet. h.) (involving a local Harris County Bail Bond Board Rule very similar to § 1704.109). This Court abstains from ruling on Texas Constitutional questions. *See Railroad Commission v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941); *Younger v. Harris,* 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). Nevertheless, because the federal constitutional rulings are not "effectively advisory," the Court proceeds with the case. *See Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 12, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987); *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 813, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976) (noting that a court should normally hear federal constitutional challenges because abstention is an "extraordinary and narrow exception to the duty of a district court to adjudicate a controversy properly before it").

on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to . . . judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party bears the initial burden of "informing the Court of the basis of its motion" and identifying those portions of the record "which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

Once the moving party meets its burden, the nonmoving party must "go beyond the pleadings" and designate "specific facts" in the record "showing that there is a genuine issue for trial." *Id.* at 324, 106 S.Ct. 2548. Throughout the analysis, the "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). An issue is "genuine" if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party. *See id.* at 247-49, 106 S.Ct. 2505. A failure on the part of the nonmoving party to offer proof concerning an essential element of its case necessarily renders all other facts immaterial and mandates a finding that no genuine issue of fact exists. *See Saunders v. Michelin Tire Corp.,* 942 F.2d 299, 301 (5th Cir.1991).

This case involves the interpretation of a Texas statute and, as such, the Court refers to Texas law on statutory interpretation. Statutes are interpreted as a matter of law. *Bragg v. Edwards Aquifer Auth.,* 71

S.W.3d 729, 734 (Tex.2002). The primary purpose of statutory interpretation is to determine the legislature's intent. *Cont'l Cas. Co. v. Downs,* 81 S.W.3d 803, 805 (Tex.2002). Hence, the plain meaning of the words used by the Legislature is the strongest indicator of its intent. TEX. GOV'T CODE ANN. § 311.011 (Vernon 2004); *Argonaut Ins. Co. v. Baker,* 87 S.W.3d 526, 529 (Tex.2002).

The First Amendment, as applied to the states through the Fourteenth Amendment, protects speech from undue government restraint. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N. Y.,* 447 U.S. 557, 561, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). However, all speech is not equal. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,* 472 U.S. 749, 758-59, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985); *see also Id.* at 562, 100 S.Ct. 2343 (citing, *inter alia, Ohralik v. Ohio State Bar Assn.,* 436 U.S. 447, 455-456, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978)). While pure political expression is afforded strong protection, and obscene speech is afforded no protection, commercial speech receives a form of intermediate protection. *See, e.g., Florida Bar v. Went For It, Inc.,* 515 U.S. 618, 623, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995); *Edenfield v. Fane,* 507 U.S. 761, 767, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993). Hence, the burden is on the government to justify a restraint on free speech, which burden varies, depending on the context of the speech. *See Id.*

Protected commercial speech is characterized as "truthful, non-deceptive information proposing a lawful commercial transaction." *Edenfield,* 507 U.S.

at 765, 113 S.Ct. 1792. However, all speech, including personal solicitations, must ultimately be assigned a level of protection correlative of "the nature of the speech taken as a whole and the effect of the compelled statement thereon." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988) (holding that solicitation of charitable contributions is "inextricably intertwined with otherwise fully protected speech" and thus merited heightened protection). The general framework for scrutinizing the majority of commercial speech is set forth in *Central Hudson,* 447 U.S. at 564, 100 S.Ct. 2343 (1980).

Under the threshold inquiry of *Central Hudson,* courts determine whether the commercial speech concerns unlawful or misleading activity. *Id.* at 563-564, 100 S.Ct. 2343. If the speech concerns unlawful or misleading activities, it may be freely regulated; otherwise, courts consider the speech under *Central Hudson's* three-pronged analysis. *Id.* at 564, 100 S.Ct. 2343. First, the government must put forth a substantial interest in support of its statute; second, the government must demonstrate that the restriction on commercial speech directly and materially advances that interest; and third, the regulation must be narrowly drawn. *Id.* at 564-565, 100 S.Ct. 2343.

Even if a statute does not violate Free Speech principles, it is void for vagueness when its "prohibitions are not clearly defined." *Grayned v. City of Rockford,* 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). A person is entitled to know what

conduct is prohibited and accepted. *Id.* Thus, when a statute might inhibit a constitutionally protected right, it is subject to thorough review. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982) ("perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights").

The Fourteenth Amendment guards citizens against unfair treatment by the state. When an individual is not the subject of a protected class, and the right impinged is not a fundamental right, the appropriate standard is rational basis review. *Heller v. Doe,* 509 U.S. 312, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993). Rational basis review asks whether there is a "relationship between the disparity of treatment and some legitimate governmental purpose." *Id.* at 320, 113 S.Ct. 2637. "On rational-basis review, a . . . statute . . . comes to us bearing a strong presumption of validity, and those attacking the rationality of the legislative classification have the burden to [negate] every conceivable basis which might support it." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314-15, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993) (citations omitted).

To state a cause of action under 42 U.S.C. § 1983, a plaintiff must allege a violation of a right secured by the Constitution or laws of the United States and demonstrate that a person acting under "color of state law" committed the alleged deprivation. *Moore v.*

Willis Indep. Sch. Dist., 233 F.3d 871, 874 (5th Cir.2000). Government entities may be held liable under § 1983 for constitutional violations only if the violation represents a governmental policy or custom. *Monell v. Dept. of Soc. Servs. of New York,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978); *Collins v. City of Harker Heights,* 503 U.S. 115, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992) (finding that municipal liability under § 1983 requires the plaintiff to show that the harm was caused by a constitutional violation and that the municipality is responsible for that violation).

V. APPLICATION OF THE LAW

The speech challenged in this case is commercial speech. A bail bondsman's solicitation merely proposes a commercial transaction. Although the result of a consummated business transaction may be to avoid arrest or get out of jail, the sole purpose of contacting the potential client is to secure business. The fact that the business that a bail bondsman pursues coincidentally involves constitutional rights does not propel the speech to a higher level of First Amendment protection. Indeed, the Supreme Court's decision in *Went For It* is instructive. There the involved statute implicated numerous constitutional rights and the Supreme Court had no trouble identifying lawyer solicitations as purely commercial. *See* 515 U.S. at 620-21, 623, 115 S.Ct. 2371 (involving a constitutional challenge to a Florida Bar rule that prohibited attorneys from using direct mail advertisements to

solicit wrongful death and personal injury clients within thirty days of the accident or disaster causing death or injury); *see also Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 459, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978) ("A lawyer's procurement of remunerative employment is a subject only marginally affected with First Amendment concerns. It falls within the state's proper sphere of economic and professional regulation.").

Contrary to the plaintiffs' arguments, the speech in this case is not "inextricably intertwined with otherwise fully protected speech," as in the case of *Riley v. Nat'l Fed'n of the Blind,* 487 U.S. at 796, 108 S.Ct. 2667. *Riley* involved a for-profit company that solicited charitable contributions on behalf of non-profit charities. *Id.* Solicitation of charitable donations is a narrow exception to the commercial speech rule. However, the facts of the case at bar do not remove bail bondsman speech from the ambit of commercial speech. *See id.*; *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983).

The plaintiffs also urge that a test more stringent than *Central Hudson* should apply The Supreme Court has yet to overrule or modify the *Central Hudson* analysis for a case such as this. *Thompson,* 535 U.S. at 367, 122 S.Ct. 1497 ("Although several members of the Court have expressed doubts about the *Central Hudson* analysis and whether it should apply in particular cases . . . there is no need in this case to break new ground. *Central Hudson,* as applied

in our more recent commercial speech cases, provides an adequate basis for decision."); *see also U.S. West, Inc. v. Fed. Communications Comm'n,* 182 F.3d 1224, 1234 n. 5 (10th Cir.1999). Because there is no contention that the solicitations by bail bondsmen concern illegal activity or would be misleading, the three-pronged analysis of *Central Hudson* applies 447 U.S. at 566, 100 S.Ct. 2343.

First Prong of Central Hudson

It is clear that the defendants may justify the governmental restraint on speech only with those "asserted interests" offered at the origination of the statute or rule. *Edenfield,* 507 U.S. at 768, 113 S.Ct. 1792 ("the *Central Hudson* standard does not permit [the Court] to supplant the precise interests put forward by the state with other suppositions"). The plaintiffs contend that, because no legislative history exists, the defendants lose on this point because neither the defendants nor the Court can bring forth new interests. While the plaintiffs pinpoint a problem in the lack of legislative history – a problem that will be addressed in turn – they either misread *Central Hudson's* first requirement or fail to realize the primary manner in which the state asserts its "substantial interests."

The first prong of *Central Hudson* requires that the state assert a substantial interest to be served by the statute. 447 U.S. at 566, 100 S.Ct. 2343. It is an elementary principle of statutory interpretation that

the statute itself provides the best evidence of the state's intent. TEX. GOV'T CODE ANN. § 311.011 (2004); *Argonaut Ins. Co. v. Baker,* 87 S.W.3d 526, 529 (Tex.2002). In this case, the state's asserted interest are to protect the public from harassment, fraud, misrepresentation, and threats to public safety and to protect the safety of law enforcement officers. § 1704.109(a). Separately or collectively these interests are substantial. However, both may be and are freely protected. It is when the state's interest seeks to regulate activity that is not misleading or illegal that greater scrutiny is required. 447 U.S. at 566, 100 S.Ct. 2343. The asserted interest of protecting the public from "harassment," therefore, merits closer study.

Section 1704.109 covers both in-person (telephone or face-face) and impersonal (mailings, etc.) solicitations. It is true that in-person solicitations are a cause for greater concern than mail-in solicitations because the danger of harassment is greater. *Shapero v. Kentucky Bar Assn.,* 486 U.S. 466, 475, 108 S.Ct. 1916, 100 L.Ed.2d 475 (1988) ("the mode of communication makes all the difference."). However, while in-person solicitations in general may be bothersome to the recipient, the mere fact that a person may be bothered or annoyed does not justify restraint. *See, e.g., International Society for Krishna Consciousness v. Lee,* 505 U.S. 672, 112 S.Ct. 2701, 120 L.Ed.2d 541 (1992) (soliciting contributions in airports); *Bolger v. Youngs Drug Prods. Corp.,* 463 U.S. 60, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983) (direct mail advertisements for

contraceptives). On the other hand, "solicitation that is neither fraudulent nor deceptive may be pressed with such frequency or vehemence as to intimidate, vex, or harass the recipient." *Edenfield,* 507 U.S. at 769, 113 S.Ct. 1792. Because solicitation may be pressed too vigorously, the "protection of the public from these aspects of solicitation is a legitimate and important state interest." *Ohralik,* 436 U.S. at 462, 98 S.Ct. 1912. Hence, the conduct of bail bondsmen may be circumscribed only when they reach beyond normal solicitation to the point of objective harassment.

Second Prong of Central Hudson

The second prong of *Central Hudson* requires the defendants to demonstrate that the restrictions on commercial speech directly and materially advance each interest. 447 U.S. at 564-565, 100 S.Ct. 2343. The regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. *Id.* Hence, the burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree. *Edenfield,* 507 U.S. at 770-71, 113 S.Ct. 1792.

The plaintiffs have repeatedly urged that the defendants cannot sustain their burden under this prong because the defendants have no knowledge of

the evidence that the Texas Legislature considered when enacting this law. The Texas Attorney General declined to intervene in this case to defend the state statute and there is no legislative history. As a result, the defendants' justifications for the enactment of section 1704.109 have been created *post-hoc,* without any suggestion that the Texas Legislature was cognizant of the evidence now presented. Hence, the issue is whether a defendant, without any knowledge of the evidence that was before the state Legislature when a law is adopted can sustain his burden of justifying a restraint on commercial speech with evidence that is admittedly generated after the enactment of the statute. The Court holds that the defendants cannot.

The policy behind the First Amendment is clear that speech should be restrained as a last resort, and that a substantial burden must be overcome when the government seeks to restrain commercial speech. Therefore, restraint that is based on mere conjecture or guessing is prohibited. *Id.* A statute restraining commercial speech must be justified by evidence that was before the Legislature at the time that the statute was adopted. *See Moore v. Morales,* 63 F.3d 358, 362 (5th Cir.1995). ["*Florida Bar* does not require an overwhelming record in support of the 30-day ban. Rather, it echoed prior precedent requiring only that there be more than 'mere speculation and conjecture.'"] The evidence need not be overly burdensome,

but rather it must be proportional to the speech it will affect.[4]

Even assuming that the defendants' belated proffered evidence merits consideration, it as insufficient to demonstrate that the restrictions on commercial speech directly and materially advance each interest identified. Specifically, there is no evidence that the solicitations were fraudulent or resulted in misrepresentation. Hence, there is no purpose to be advanced. And, limiting the times during which a bail bondsman may contact an individual or his family does nothing to prevent fraudulent behavior. Therefore, the actual interest of the government is not apparent. A court will not "turn away if it appears that the stated interests are not the actual interests served by the restriction." *Edenfield,* 507 U.S. at 768, 113 S.Ct. 1792 (citing *Mississippi Univ. for Women v.*

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[4] The Court takes notice of areas of law requiring some evidentiary justification for an enacted law, especially First Amendment cases involving regulation of sexual-oriented businesses. *See, e.g., City of Los Angeles v. Alameda Books,* 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002); *Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 51, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986) (involving zoning of sexual oriented businesses; some evidence of secondary effects is required, although one city can rely on another city's evidence). *See also, Kassel v. Consolidated Freightways Corp. of Del.,* 450 U.S. 662, 671, 101 S.Ct. 1309, 67 L.Ed.2d 580 (1981) (involving the regulation of highway safety under the commerce clause; statistics and studies presented by the state "failed to present any persuasive evidence that 65-foot doubles [18-wheelers] are less safe than 55-foot singles").

Hogan, 458 U.S. 718, 730, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982)).

Another professed purpose of the statute is to limit harassment. The defendants offer evidence that harassment occurs when, after a person is arrested and this information becomes available to bail bondsmen, multiple independent[5] bondsmen contact the family of the arrestee to notify the family of potential bail bond services. These contacts are made by telephone and may occur at any hour. However, there is no evidence to support the conclusion that when the opportunity presents, multiple calls do not occur. The statute does not prevent multiple calls from occurring. The statute merely prohibits calls during the 24 hours after arrest. Nothing prevents 30 separate phone calls from bail bondsmen after the 24-hour period has expired. Thus, the 24-hour prohibition does not pass constitutional muster.

In addition, there is no evidence that the family would prefer to forgo the knowledge of a family member's arrest during the 24 hours following an arrest. While the defendants argue that "common sense" helps to justify this restraint, common sense likewise counsels that family members want to know the whereabouts of a loved one and secure legal

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[5] The defendants are unclear whether they complain about one bondsman calling "20-40 times," or 20-40 bondsmen calling one time each. Because a rule can easily be made limiting each bondsman to one call per arrestee, the Court assumes the complaint pertains to multiple, independent bondsmen.

representation, if appropriate. In this sense, both the First and Sixth Amendments weigh against the statute. The defendants also offer affidavits that citizen complaints were reduced after the implementation of a similar local rule. However, that evidence fails to account for the number of citizen complaints before the legislation was enacted and the nature of those complaints.

Although TEX. BUS. & COM. CODE § 37.02(a)(2) (2002) prohibits telephonic solicitation from 9:00 p.m. to 9:00 a.m., the code covers only people soliciting a "consumer good or service," such as solicitation for the sale of real and personal property, or a service related to real or personal property. *Tex. Prac. Guide Bus. & Com. Litig.,* Ch. 32XIII, §§ 32:209-10 (citing TEX. BUS. & COM. CODE ANN., §§ 37.01(2), 37.01(3)). Thus, the Act does not apply to the solicitation of bail bonding services.

The final proffered purpose for the statute is preserving the safety of the public and of law enforcement officers by prohibiting bail bonding companies from soliciting persons who are the subject of an unexecuted arrest warrant. In the abstract, the justification appeals to common sense. Executing a warrant, a potentially dangerous event, is arguably safer when the officers have the element of surprise. Similarly, a defendant who is arrested before he is aware that a warrant is outstanding will have little opportunity to flee or obstruct justice. However, there is no data showing that in those instances where a person becomes aware of an outstanding warrant

they flee or obstruct justice. Likewise, there is no evidence of an occurrence involving an arrestee who, after being alerted to an existing arrest warrant by a bail bondsman, subsequently injured an officer.

Finally, the facts illustrate that law enforcement officers and attorneys contact subjects of unexecuted arrest warrants without notable events. While common sense dictates that there exists the possibility that an individual might flee or hurt an officer, it is not based on substantial evidence. In this case, common sense will not justify the restraint on speech.

Third Prong of Central Hudson

The final prong of *Central Hudson*, whether the statute is narrowly drawn, does not require that the statute be drawn as narrowly as possible. Rather, courts ask whether "the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech" while still effectively serving the same interests. *Thompson* 535 U.S. at 371, 122 S.Ct. 1497. In this case, the Court notes that there are numerous alternatives to the total prohibition against contact with subjects of unexecuted arrest warrants. For instance, the county could increase the number of officers executing arrest warrants, thereby arresting risky offenders before the 48-hour JIMS window expires. Alternatively, officers could extend the JIMS blackout period from 48 hours to some longer period in order to give authorities enough time to execute the risky warrants. The

prohibition against bail bondsmen solicitation could be limited to certain categories of risky arrest warrants (e.g., those for crimes of violence). According to the defendants, law enforcement officers have a screening mechanism that identifies which individuals get notified about unexecuted warrants. The same screening mechanism could be utilized by bail bondsmen. Such an arrangement would prevent risky "tip-offs" while allowing others to avoid an embarrassing arrest.

The Court's purpose is not to micromanage state law, but rather to be mindful that, "[i]f the First Amendment means anything, it means that regulating speech must be a last – not first – resort." *Thompson* 535 U.S. at 373, 122 S.Ct. 1497. *See also Utah Licensed Beverage Ass'n v. Leavitt,* 256 F.3d 1061, 1073-75 (10th Cir.2001) (holding that the government could not justify its speech regulations as directly and materially advancing state interests where the regulatory scheme was irrational and the government failed to demonstrate that the harms it recited were real or that the regulations would materially reduce those harms); *U.S. West, Inc.,* 182 F.3d at 1237 (holding the FCC could not justify its restriction on speech with mere conjecture – it could not demonstrate that the harms it recited were real and that the restriction would in fact alleviate those harms to a material degree where the government simply pointed to).

The Plaintiffs' § 1983, Void for Vagueness and Equal Protection Claims

Having concluded that the statute is unconstitutional, the defendants in this case are liable under 42 U.S.C. § 1983 for depriving the plaintiffs of their constitutional rights. A state statute, like the one in this case, is unquestionably the result of state action. *Lugar v. Edmondson Oil Co.,* 457 U.S. 922, 941, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982). Similarly, a state official who acts, or would act, pursuant to a state statute is a state actor for the purposes of section 1983. *See id.*; *Carhart v. Stenberg,* 192 F.3d 1142 (8th Cir.1999). The appropriate remedy however is not damages but injunctive relief. Therefore, the Court holds that the defendants should be enjoined from enforcing the statute. *See Kolender v. Lawson,* 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983).

The plaintiffs have advanced other bases for holding the statute unconstitutional. They argue that the statute is void for vagueness and that it violates the "equal protection" clause of the Fourteenth Amendment as it distinguishes between bail bondsmen who have existing bond(s) with an accused and those who do not. The Court need not address these contentions in light of its holding.

VI. CONCLUSION

For the reasons stated, the Court finds that the plaintiff's motion for summary judgment is GRANTED in part and DENIED in part, and the

defendants' motion is DENIED. The Court HOLDS that the statute is unconstitutional and that the defendants are ENJOINED from enforcing it. The plaintiffs' claim for an attorneys' fee and costs is to be submitted to the Court on or before May 31, 2005. The defendants' response is due on or before June 10, 2005.

It is so ORDERED.

United States District Court,
S.D. Texas, Houston Division.
Carl R PRUETT, et al, Plaintiffs,
v.
HARRIS COUNTY BAIL BOND BOARD, et al, Defendants.
No. Civ.A.H-03-3241.

July 20, 2005.

David A. Furlow, Thompson & Knight LLP, Houston, TX, for Plaintiffs.

George A. Nachtigall, Deputy Chief Trial Division, Houston, TX, for Defendants.

HOYT, J.

Before the Court is the plaintiffs' motion to recover an attorney's fee, expert witness fees and expenses, the plaintiffs' motion to withdraw their claim for estimated future fees and the defendants' response. The Court has reviewed the motions and is of the opinion that the motion to recover an attorney's fee and expenses should be granted in part and denied in part; and the motion to withdraw claim for future future attorney's fees should be granted without comment.

The plaintiffs have requested attorney's fees and costs of $197,895.73 and have provided affidavits for the reasonableness and necessity of the fees and expenses. The defendants' response to the request is two-fold. First, the defendants argue that the case challenges the constitutionality of a state statute that

was not sought or enforced by Harris County and the Bail Bond Board. In this instance, the defendants contend that the circumstances render the award of attorney's fees and costs unjust. The defendants cite to *Hensely v. Eckerhart* 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) as authority. Second, the defendants argue, if the Court were to award fees and costs, the Court should recognize that the plaintiffs' request is excessive, redundant or otherwise unnecessary in several respects. Based on these expenses [efforts to block intervention by International Fidelity Insurance Company, the Texas Attorney General] the defendants assert that any fee awarded should be reduced by $20,085.00.

The Court agrees with the defendants in several respects. While the Court does not question the propriety or extent of the plaintiffs' request, the Court is concerned with the issue of whether any award should be made against the defendants. Hence, the Court is of the opinion that the Court should award only nominal fees in light of the fact that: (a) Harris County is not involved in the regulation of bail bondsmen; (b) the Harris County Bail Bond Board is not a policy making body; it merely enforces the laws and policies of the state of Texas; and (c) neither Harris County nor the Bail Bond Board enforced the statute against the plaintiffs.

Therefore, the Court is of the opinion that an attorney's fee of $50,000 plus costs of court should be awarded. However, in the event of an appeal of the

judgment entered in the case, the Court awards an additional $25,000 in attorney's fees.

It is so ordered.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CARL R. PRUETT, *et al*,	§	
	§	
Plaintiff,	§	
	§	
VS.	§	CIVIL ACTION NO.
	§	H-03-3241
HARRIS COUNTY BAIL BOND BOARD, *et al*,	§	
	§	
	§	
Defendant.	§	

FINAL JUDGMENT

Pursuant to the Memorandum Opinion and Order entered in this case [#67], the defendants, Harris County Bail Bond Board and Harris County, Texas are ENJOINED from enforcing Tex. Occ. Code Ann. § 1704.109. The plaintiffs' are also awarded an attorney's fee in the amount of $50,000 plus costs of Court. In the event of an appeal, the plaintiffs are awarded an additional attorney's fee of $25,000. Interest shall accrue on the $50,000 award at the rate of 1.59% per annum.

This is a Final Judgment.

SIGNED and ENTERED this 20th day of July, 2005.

/s/ Kenneth M. Hoyt
Kenneth M. Hoyt
United States District Judge

STATUTORY PROVISIONS INVOLVED

TEX. OCC. CODE ANN. § 1704.109

(a) A board by rule may regulate solicitations or advertisements by or on behalf of bail bond sureties to protect:

(1) the public from:

(A) harassment;

(B) fraud;

(C) misrepresentation; or

(D) threats to public safety; or

(2) the safety of law enforcement officers.

(b) A bail bond surety, an agent of a corporate surety, or an employee of the surety or agent may not make, cause to be made, or benefit from unsolicited contact:

(1) through any means, including in person, by telephone, by electronic methods, or in writing, to solicit bonding business related to an individual with an outstanding arrest warrant that has not been executed, unless the bail bond surety or agent for a corporate surety has an existing bail bond on the individual; or

(2) in person or by telephone to solicit bonding business:

(A) that occurs between the hours of 9 p.m. and 9 a.m.; or

(B) within 24 hours after:

(i) the execution of an arrest warrant on the individual; or

(ii) an arrest without a warrant on the individual.

(c) This section does not apply to a solicitation or unsolicited contact related to a Class C misdemeanor.

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42 U.S.C. § 1988(b)

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

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No. 07-697

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In The

Supreme Court of the United States

HARRIS COUNTY BAIL BOND BOARD
& HARRIS COUNTY,

Petitioners,

versus

CARL R. PRUETT & SCOTT MARTIN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS CARL R. PRUETT'S AND SCOTT MARTIN'S RESPONSE IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Fifth Circuit's unanimous and well-reasoned Rehearing Opinion about the unconstitutionality of Texas Occupations Code Section 1704.109(b)(1)'s ban on truthful, non-misleading speech about the right of citizens to avoid arrest and incarceration by posting a bail bond conflict with any decision of this Court, a federal court of appeals, or the supreme court of any state?

2. Did the Fifth Circuit properly conclude that Texas Occupations Code Section 1704.109(b)'s unlimited-in-duration, speaker-specific restrictions on the right of independent bondsmen who lack an existing business relationship with the subject of an arrest warrant to communicate a truthful, non-misleading message about the availability and cost of bail-bonding services under this Court's precedent in *Central Hudson Gas & Electric Corporation v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980), *Edenfield v. Fane,* 507 U.S. 761 (1993), and *Thompson v. Western Medical Center,* 535 U.S. 357 (2002)?

3. In its Rehearing Opinion, the Fifth Circuit upheld the right of Respondents Carl R. Pruett and Scott Martin to recover the reasonable and necessary trial and appellate court attorney's fees and costs they incurred to obtain declaratory and injunctive relief permanently enjoining the Harris County Bail Bond Board and Harris County from taking enforcement actions against their licenses, livelihoods, and free exercise of their First Amendment rights to speak and associate

QUESTIONS PRESENTED FOR REVIEW – Continued

with their prospective customers. Did the Fifth Circuit issue an opinion in conflict with this Court's precedent, the decision of any federal circuit court, or the decision of any state supreme court by reaffirming that the prevailing plaintiffs in a Civil Rights Act lawsuit are entitled to recover their reasonable and necessary attorney's fees and expenses under 42 U.S.C. §1988?

PARTIES TO THE PROCEEDINGS

Including the parties named in the caption of this Petition, the parties are:

Petitioners: The Harris County Bail Bond Board and Harris County, Texas.

Respondents: Carl R. Pruett and Scott Martin.

CORPORATE DISCLOSURE STATEMENT

Respondents Carl R. Pruett and Scott Martin are individuals who do not fall within the scope of Supreme Court Rule 29.6's disclosure requirement.

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RESPONSE IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondents CARL R. PRUETT and SCOTT MARTIN (collectively, "Pruett") request this Court to deny the petition for writ of *Certiorari* to the U.S. Court of Appeals for the Fifth Circuit filed by the HARRIS COUNTY BAIL BOND BOARD and HARRIS COUNTY (collectively, the "Board").

OPINIONS BELOW

The Fifth Circuit's opinion is published at 499 F.3d 403 and the Southern District of Texas' opinion is published at 400 F.Supp.2d 967.

RESPONSE TO PETITIONERS' STATEMENT OF JURISDICTION

The Fifth Circuit entered its Rehearing Opinion on August 28, 2007. This Court has federal question jurisdiction over this case under 28 U.S.C. §1254(1).

The Board's Statement of Jurisdiction admits that, "a copy of the Original Complaint was served upon the Attorney General," but asserts that it does not "believe that the lower courts certified to the Attorney General the fact that the constitutionality of a Texas statute was drawn into question." The Board does not cite anything in support of its belief. Yet even *if* non-certification occurred, it would not affect

this Court's jurisdiction. *Buffalo Teachers Federation v. Tobe,* 446 F.Supp.2d 134, 142 n.7 (W.D.N.Y. 2005), *aff'd,* 464 F.3d 362 (2d Cir. 2006), *cert. denied,* ___ U.S. ___, 127 S.Ct. 2133 (2007); *In re Bruce Young,* 82 F.3d 1407, 1412 (8th Cir. 1996), *vacated on other grounds,* 521 U.S. 1114 (1997).

On October 24, 2003, Texas Attorney General Gregg Abbott declined to defend the constitutionality of Texas Occupations Code Section 1704.109(b) after reading Plaintiffs' Original Complaint. RESPONDENTS' APPENDICES 6 at App. 1-2 and 7 at 15-20; 783-84; BOARD APPENDIX 1 at 2 n.1; BOARD APPENDIX 2 at 29-30; 4207-09 & 4129 ¶49; 4209. In Attorney General Opinion GA No. 05-02 (Jan. 24, 2007), at www.oag.state.tx.us/opinions/op50abbott/ga-0502.htm, Attorney General Abbott referred to "a federal district court in Houston [that] struck down the entirety of subsection (b) [footnoting Section 1704.109], holding it an improper restriction on commercial speech under the standard of *Central Hudson* ... *See Pruett v. Harris County Bail Bond Board,* 400 F.Supp.2d 967 (S.D.Tex. 2005)." *See* RESPONDENTS' APPENDIX 8 at App. 9-10 fn.1. The Attorney General was always aware of this case, but *chose* not to defend the statute.

STATUTORY PROVISIONS INVOLVED

Section 1704.109(b)(1), the subject of this appeal, is BOARD APPENDIX 5.

RESPONSE TO PETITIONERS' STATEMENT OF THE CASE

This First Amendment case involves a challenge to the constitutionality of Section 1704.109(b). Subsection (1) of that statute imposes, *inter alia,* an anti-competitive, speaker-specific, unlimited-in-duration restriction on the right of independent bail-bondsmen to communicate a truthful, non-misleading message to specific citizens about unserved, public record arrest warrants. The Board also complains of an attorney's fee award to the prevailing parties. In a conditional cross-petition, Pruett appeals the Fifth Circuit's reversal of the District Court's invalidation of Subsection 1704.109(b)(2)(A)'s restriction on late night calls about late night incarcerations.

1. The unpersuasive First Court of Appeals' opinion the Board cites does not create a circuit split and is currently under Texas Supreme Court review.

The Board's Petition at 5 cites *Harris County Bail Bond Board v. Pruett,* 177 S.W.3d 260 (Tex.App.–Houston [1st Dist.] 2005), *pets. granted,* No. 05-0283, 2006 Tex. LEXIS 841 (Tex. Sept. 1, 2006) to argue that the anti-solicitation law is constitutional. The District Court and the Fifth Circuit rejected that analysis. BOARD APPENDIX 1 at App. 4-5 n.2 and APPENDIX 2 at App. 34-35 n.3. The Texas Supreme

Court granted review of that opinion and heard oral argument on December 6, 2006.[1]

2. This case does not concern capital-offense warrants, habitual-defendant warrants, or other "no bond" defendants, but, in most cases, warrants for non-violent misdemeanors.

This case concerns bail-bonding solicitation that typically involves misdemeanor warrants in hot check, theft, theft of services (unreturned video), marijuana, and driving-with-suspended-license cases. BOARD APPENDIX 1 at 11, 11 n.17, 15-17, and 15-16 nn. 26 and 27 (Sheriff's letters to misdemeanor defendants); RESPONDENTS' APPENDIX 9 at App. 14 ¶5; R. 47 at 2697-2700 ¶¶35-42; R. 1 at 32-33; R. 47 at 2697 ¶35; RESPONDENTS' APPENDIX 17 at App. 48 (most warrants result from "a bad check or an unpaid traffic citation"). Bondsmen have no reason to contact defendants the county precludes from posting bond. RESPONDENTS' APPENDIX 9 at App. 19 ¶¶20-21. "No

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[1] Those familiar with Texas politics know that the opinion's author, Judge Sheri Radack, is the spouse of Precinct #3 Commissioner Steve Radack, a six-term incumbent on Harris County's Commissioners Court. *See* Staff writers, *Perverse persistence: By appealing the Bible case, Commissioners Court needlessly cost taxpayers a small fortune in legal fees*, Houston Chronicle, Section B, p. 8 (Nov. 29, 2007) (Steve Radack's incumbency); Ron Nissimov, *Election '98; Republicans ease into lead in civil district court races*, Houston Chronicle (Nov. 4, 1998), Section A, p. 31 (the marriage).

bond" defendants include habitual-defendants; offenders on probation, parole, or deferred-adjudication; and defendants who pose a threat to a crime victim or witness. RESPONDENTS' APPENDIX 27 (Board member Braddock) at App. 102-04.

3. Pruett and Martin act responsibly to avoid endangering the police and public.

The Board's Petition does not describe the care professional bondsmen take to avoid endangering the police and public. These bondsmen neither solicit work in "no bond" cases nor communicate with defendants indicted by a grand jury but not yet arrested. R. 1 at 32 ¶22; RESPONDENTS' APPENDIX 9 at App. 18-19 ¶¶17-20; R. 47 at 2709-10 ¶¶56-61. They respect the Harris County Justice Information Management System ("JIMS") and its 48-hour blackout on release of information about warrants (since October 30, 2000). R. 47 at 2696 ¶32 and 2708 ¶55, and RESPONDENTS' APPENDIX 9 at App. 18 ¶18. This blackout lets officers arrest high-priority defendants without warning. RESPONDENTS' APPENDIX 9 at App. 14 ¶6; R. 42 at 2211 ¶6; R. 47 at 2696 ¶32.

The District Attorney's website states that bail reflects severity of the defendant's type of offense, along with the defendant's prior criminal history. R. 1, 29 ¶14 and 193. RESPONDENTS' APPENDIX 9. If likelihood of flight, severity of offense, or potential danger to the complainant come to a prosecutor's attention, a prosecutor can file a high-bond request with the

court. *Id.* To minimize risks to the police and public, these bondsmen refrain from soliciting such high-bond work, *i.e.,* bonds over $20,000.00 and cases involving kidnapping, sexual assault, indecency with a child, and animal cruelty. RESPONDENTS' APPENDIX 9 at App. 19, ¶¶21-22; R. 47 at 2709-10 ¶¶56-60. Their communications are honest, and they avoid high pressure tactics. RESPONDENTS' APPENDIX 9 at App. 21, ¶¶28-31; R. 47 at 2712 ¶71. Martin's employees follow a script and send informational letters. RESPONDENTS' APPENDIX 9 at App. 18-23; RESPONDENTS' APPENDICES 10-12. They work to ensure that defendants attend all hearings. RESPONDENTS' APPENDIX 9 at App. 19-20, ¶¶23-25; R. 47 at 2710 ¶¶63-64.

4. Martin's letters and Pruett's calls help citizens exercise their constitutionally-protected right to post bond; reduce jail overcrowding, jail-rapes, jail-assaults, and jail-suicides; and benefit the police and public.

Martin's letters and Pruett's intrastate calls about unserved warrants benefit four groups. The first consists of defendants named in warrants. Although news of a warrant may be unpleasant, most contactees are grateful to receive a bondsman call. RESPONDENTS' APPENDIX 9 at App. 16; R. 36 at 1605; RESPONDENTS' APPENDIX 25 at App. 80-82; R. 47 at 2712-13 ¶¶71-72, 2867-68, and 2884-2917 (twelve affidavits). A bondsman frequently provides a citizen with a first notice of eligibility to post bond. RESPONDENTS' APPENDIX 9 at App. 16; R. 47 at 2707 ¶¶52-53.

A voluntary bond-posting enables a presumptively-innocent citizen to avoid the humiliation of a manhunt and arrest; injury or death during arrest; loss of freedom; loss of time in jail; illness contracted in jail; and physical or sexual assault at the hands of fellow arrestees and even jailors. RESPONDENTS' APPENDIX 9 at App. 34 (Martin); RESPONDENTS' APPENDIX 12 at App. 34-36 (the Sheriff's "avoid the humiliation of arrest" letter); R. 1 at 31-32, ¶21 and 60-61 ¶95 and 88-89 ¶17; R. 40 at 1801-02 ¶¶49-52 and 2201-02. *See also Edwards v. State,* 97 S.W.2d 279, 283 (Tex.App.–Houston [1st Dist.] 2003, *pet. ref'd* June 4, 2003) (a woman picked up on an unserved Harris County warrant for theft was sexually assaulted by the driver transporting her to Harris County); *Garcia v. State,* 57 S.W.3d 436, 431 (Tex.Crim.App. 2001) ("misdemeanor assault" in Harris County Jail); *Jones v. State*, No. 14-98-00513-CR, 1999 Tex. App. LEXIS 8749 (Tex.App.–Houston [14th Dist.] Nov. 4, 1999, no pet. h.) (unpublished) (sodomization of a "17-year-old first-time jail inmate" in Harris County Jail); *Alberti v. Heard,* 600 F.Supp. 443, 457 (S.D.Tex. 1984) (in Harris County's jails, "[i]nmate beatings and homosexual rapes and attacks are prevalent ... "), *aff'd sub nom. Alberti v. Klevenhagen*, 790 F.2d 1220, 1224-26 (5th Cir. 1986), *further rev. denied,* 799 F.2d 992 (5th Cir. 1986) (*per curiam*) (same). As Justices Blackmun and Brennan noted in *United States v. Bailey,* 444 U.S. 394 (1980) (dissents), "[a] youthful inmate can expect to be subjected to homosexual gang rape his first night in jail, or, it has been said, even in the van on the way to jail." *Id.* at 421, citing *Report*

on Sexual Assaults in a Prison System and Sheriff's Vans, in 3 L. Radzinowicz & M. Wolfgang, eds., CRIME AND JUSTICE 223-28 (2d ed. 1977).

For young people suffering from mental illness, arrest and incarceration always bring a real risk of a jailhouse suicide. *Jutzi-Johnson v. United States*, 263 F.3d 753 (7th Cir. 2001), *rhg. denied*, 2001 U.S. App. LEXIS 25499 (7th Cir. Nov. 26, 2001) (citing Lindsay M. Hayes & Joseph R. Rowan, National Center on Institutions and Alternatives, NATIONAL STUDY OF JAIL SUICIDES: SEVEN YEARS LATER (1988), and stating that "12.9 percent of jail suicides occur within three hours of confinement, [and] 32.8 percent within the first 24 hours ... "); *Simmons v. City of Philadelphia*, 947 F.2d 1042, 1049-55 (3d Cir. 1991) (twenty suicides).

The second group that benefits from bondsman solicitation consists of parents, spouses, children, and employers. R. 1 at 221-22. A person who might otherwise go to jail can continue to work, support a family, and assist the lawyer defending the case. *Id.*

Taxpayers are the third group that benefits. The Sheriff's Department's Detention system houses over 7,000 inmates at any one time, overseen by a staff of 1,500 certified detention officers. R. 40 at 1807-08 ¶63. When a citizen posts bond, it saves the county money. R. 1 at 31 ¶21 and 32-33 ¶25 and 233; R. 40; Appellees' Brief, p. 51.

Law enforcement officers are the fourth group who benefit. That is why they send tens of thousands of "avoid the humiliation of jail" letters to the misdemeanor defendants Pruett would like to contact. BOARD APPENDIX 1 at App. 15-16 and *id.*, nn. 26-27; RESPONDENTS' APPENDICES 13-17 at App. 40-48; R. 36 at 1609-13. When a citizen posts bond, no law officer has to go on a manhunt. R. 1 at 31 ¶21; R. 40 at 1793. Voluntary bonding reduces the risks law officers face.

REASONS FOR DENYING THE BOARD'S AND COUNTY'S PETITION

There is only one good reason to consider granting *Certiorari* on the Board's first point of appeal: first, together with Pruett's Conditional Cross-Petition for *Certiorari,* the Board's first point provides this Court with an excellent opportunity to replace the increasingly outdated *Central Hudson* standard with a strict scrutiny standard that fully protects truthful, non-misleading speech about matters of public record essential to the exercise of the constitutionally-protected right to post bail.

If the Court will not end the artificial distinction that disfavors "commercial" speech for reasons not evident in the First Amendment's text and history, there are six reasons to deny the Board's Petition. First, Section 1704.109(b)(1)'s severe, speaker-specific, content-based restriction merits strict scrutiny review it cannot survive. Second, the Board's failure to

quantify the alleged risks of the subsequent criminal conduct it targets merits denial of *Certiorari*. Third, the Board failed to bear its *Central Hudson* burden of proving that this overbroad and under-inclusive statute directly and materially advances the Board's speculative, *post hoc* justifications of protecting the police and public. Fourth, the Board failed to bear its burden of proving narrow tailoring when adequate non-censorial alternatives existed to achieve the Board's *post hoc* justifications for restricting solicitation. Fifth, the statute denies Pruett's contactees their First Amendment right to receive truthful information enabling them to avoid arrest by posting bond. Sixth, the Board offers no reason to deny prevailing parties the right to recover the attorney's fees expended due to the Board's dogged defense of its right and power to censor bondsmen.

I. The Fifth Circuit correctly concluded that Texas Occupations Code Section 1704.109(b)(1)'s unlimited-duration ban on truthful, non-misleading speech about a citizen's right to peacefully post a bail bond violates the First Amendment.

A. Section 1704.109(b)(1)'s imposition of a speaker-specific, unlimited-in-duration ban on truthful, non-misleading speech about public record, criminal-court cases merits strict scrutiny review–a review it cannot survive.

1. This case does not involve a "time, place, and manner" restriction, but, instead, a ban of unlimited duration.

On page 4 of its Petition, the Board argues that Section 1704.109(b)(1) "does not offend constitutional provisions as it merely places reasonable, temporal restrictions on commercial speech." That is not true, as the Fifth Circuit recognized when it ruled that "restrictions on commercial speech without any time limitation are inherently suspect." BOARD APPENDIX 1 at App. 14. Section 1704.109(b)(1) is not a "temporal" limitation. It silences a bondsman until after an arrest warrant is served, however long it takes–"days weeks, or even months after warrants are issued." *Id.* at App. 15. This is not a "time, place, and manner" case because commercial speech is not governed by a "time, place, and manner" test, but, instead, by the *Central Hudson* test.

The Texas Legislature could have crafted a temporal limitation in Section 1704.109(b)(1), as it did last year in Senate Bill 244 ("SB 244"), effective September 1, 2007. Amended Texas Code of Criminal Procedure article 18.011 enables prosecutors to seal public record search warrants for up to 60 days, "if the [State's] attorney establishes a compelling state interest in that: (1) public disclosure of the affidavit would jeopardize the safety of a victim, witness, or confidential informant or cause the destruction of evidence; or (2) the affidavit contains information obtained from a court-ordered wiretap that has not expired ... " *See* RESPONDENTS' APPENDIX 29 at App. 120-25. That enactment undercuts the Board's arguments on pages 9-13 of its Petition, for it enables prosecutors to keep some warrants confidential for a limited period to avoid "the destruction of evidence or other tampering that could negatively impact an ongoing investigation." When International Fidelity Insurance Company ("IFIC") General Counsel Roger Moore drafted Section 1704.109(b)(1), he did not protect the police or public but, instead, IFIC's profits. He sought to quash competition.

2. Section 1704.109(b)(1) is a speaker-specific, content-based restriction that merits strict scrutiny review – a review it cannot withstand.

Section 1704.109(b)(1) imposes a speaker-specific, content-based ban on the right of Pruett to speak,

Martin to write letters, and their contactees to receive their lawful message. The statute targets speech "to solicit bonding business related to an individual with an outstanding arrest warrant that has not been executed ... " It censors news about a citizen's eligibility to post bond. RESPONDENTS' APPENDICES 9-12 at App. 12-31. The Board justifies Section 1704.109(b)(1) *post hoc* based on the unquantified risk that someone, somewhere, might respond irrationally to a bondsman's truthful message by lying in ambush to shoot the police–something utterly irrational and probably fatal for anyone who does so. R. 40 at 1798-1804, ¶¶41-57.

In *United States v. Playboy Entertainment*, 529 U.S. 803 (2000), this Court ruled that if "[t]he speech in question is defined by its content[, then] the statute which seeks to regulate it is content-based." *Id.* at 811. *See also Boos v. Barry*, 485 U.S. 312, 321 (1988); *Carey v. Population Services, International*, 431 U.S. 678, 701 (1971); *Turner Broadcasting Sys., Inc. v. F.C.C.*, 512 U.S. 622, 643 (1994); *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994). When a restriction "focuses only on the content of the speech and the direct impact that speech has on its listeners," as here, it is a content-based regulation. *Playboy,* 529 U.S. at 811. In *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992), this Court ruled that, "[l]isteners' reaction to speech is not a content-neutral basis for regulation."

Speaker-specific restrictions target the message by targeting the messenger and are content-based.

"Even under the degree of scrutiny that we have applied in commercial speech cases," this Court ruled in *Greater New Orleans Broadcasting Association, Inc. v. United States*, 527 U.S. 173, 181 (1999), "decisions that select among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment." *See also Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828-29 (1995) (same); *Pitt News v. Pappert*, 379 F.3d 96, 110-11 (3d Cir. 2004). Section 1704.109(b)(2) silences the independent bondsman.

The statute raises serious Fourteenth Amendment Equal Protection issues. A "content-based speech restriction ... can stand only if it satisfies strict scrutiny ... If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *Playboy*, 529 U.S. at 813; *Boos*, 485 U.S. at 329. *See Cincinnati v. Discovery Network*, 507 U.S. 410, 428 (1993) (an anti-competitive ban of newsracks used for commercial-handbills, but not newspapers, was content-based); *Texas State Troopers Association v. Morales*, 10 F.Supp.2d 628 (N.D.Tex. 1998).

The Board suggests that the citation of *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781 (1988) proves that the Fifth Circuit "was not applying this Court's time, place and manner/commercial speech precedents when it concluded that the statute in question is not sufficiently tailored to pass constitutional scrutiny." That is not true. The Fifth Circuit cited *Riley* to show how courts consider

"more narrowly tailored means," not to apply *Riley's* elevated standard of review. BOARD APPENDIX 1 at App. 6-7 n.5 and 14 n.23. If this Court grants *Certiorari,* it should elevate the standard governing truthful, non-misleading speech about public record, criminal court information. That would comport with *Riley's* holding that, "even assuming, without deciding, that such speech in the abstract is indeed merely 'commercial, we do not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech." *Id.* at 796.

As the Fifth Circuit held, the test in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557 (1980), rather than a time, place and manner analysis applicable to sexually oriented businesses, governs this case. *Id.* at 6-8. In *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991), this Court held that the First Amendment only "marginally" protects nude dancing. Some courts have since relaxed First Amendment standards "by adopting a 'legislative notice' theory that is said to be analogous to the concept of judicial notice." *Mitchell v. Commission on Adult Entertainment Establishments*, 10 F.3d 123, 136 (3rd Cir. 1993). But commercial speech does not arise out of semi-pornographic contexts, so there is no reason to equate it with the bump and grind of the strip club. This case is about bail bonds, not bare breasts.

Section 1704.109(b) is an anti-competitive, speaker-specific restriction aimed at independent-bondsmen

who compete with IFIC bonding-agents. Like a collusive agreement among competitors to refrain from advertising, an advertising-ban increases the price consumers pay. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996); R. 36 at 1635-45 and 1648-49; R. 49 at 3184; Pruett's Cross-Petition at 11-21. The Board failed to bear its burden of proof under intermediate scrutiny, so it cannot win under the strict scrutiny standard that ought to govern this case.

B. The Board fails to show a circuit split or conflict with this Court's precedent.

1. The Board cites no circuit split.

On pages 5-13 of its Petition, concerning warrants, the Board fails to identify even one conflicting federal circuit court or state supreme court decision. Nor does the Board show how the Rehearing Opinion conflicts with this Court's precedent.

2. The Fifth Circuit's ruling regarding unserved warrants breaks no new ground in First Amendment analysis.

The Fifth Circuit adhered to well-reasoned precedent in holding that an unlimited-duration ban on speech violates the First Amendment. In *Speaks v. Kruse*, 445 F.3d 396, 400 (5th Cir. 2006), *Bailey v. Morales*, 190 F.3d 320, 324-25 (5th Cir. 1999), *Moore v. Morales*, 843 F.Supp. 1124 (S.D.Tex. 1994), *rev'd in*

part and aff'd in part, 63 F.3d 358 (5th Cir. 1995), *cert. denied,* 516 U.S. 1115 (1996), and *Innovative Database System v. Morales*, 990 F.2d 217, 222 (5th Cir. 1993), the Fifth Circuit ruled that similar, restrictions on the speech of chiropractors, criminal-defense attorneys, and other professionals violated the First Amendment. R. 36 at 1625-29.

The Rehearing Opinion is consistent with decisions striking down statutes that interfere with truthful, non-misleading commercial speech. *See Ficker v. Curran*, 119 F.3d 1150 (4th Cir. 1997); *U.D. Registry, Inc. v. California*, 144 Cal.Rptr.4th 405, 410-14, 425 (Cal.Ct.App. 2006, *rhg. denied*), *rev. denied*, 2007 Cal. LEXIS 3098 (Cal. Feb. 7, 2007); *Anderson Courier Service v. State,* 104 S.W.3d 121 (Tex.App.–Austin 2003, *pet. denied*); *State of Florida v. Bradford,* 787 So.2d 811 (Fla. 2001); *Chicago Title Insurance Company v. Butler,* 770 So.2d 1210 (Fla. 2000); *Insurance Adjustment Bureau v. Insurance Commissioner for Commonwealth of Pennsylvania*, 518 Pa. 210, 542 A.2d 1317, 1323 (Pa. 1988); *Silverman v. Walkup*, 21 F.Supp.2d 775, 780 (E.D.Tenn. 1998); *Babkes v. Satz,* 944 F.Supp. 909, 912-14 (S.D.Fla. 1996); *IMS Health, Inc. v. Ayotte*, No. 06-CV-280-PB, 2007 U.S. Dist. LEXIS 31779 (D.N.H. Apr. 30, 2007) (unpublished). The same logic applies to Section 1704.109(b)(1)'s restriction of truthful speech. Assuming, *arguendo,* that its drafters sought to plug leaks, those plumbers were incompetent, because Texas'

justice system leaks arrest-warrant information like a sieve. That same information is available to anyone who accesses JIMS; receives a Sheriff's, Constable's or police officer's letter about a warrant; calls a deputy; or reads a newspaper.

3. The personal-injury attorney solicitation case the Board cites, *Florida Bar v. Went for It*, does not apply to a statute targeting bondsmen.

The Board cites a personal-injury, lawyer-solicitation case about a state bar disciplinary rule, *Florida Bar v. Went for It*, 515 U.S. 618 (1995), to support its argument, but the Rehearing Opinion does not conflict with it. This case is about bondsmen, not barristers. Most bondsmen are small business owners or minimum-wage workers, not contingency-fee attorneys. Cases about attorneys do not apply outside the legal profession. *See* Judge Alex Kozinksi & Stuart Banner, "Who's Afraid of Commercial Speech?," 76 VA. L. REV. 627, 630 (May 1990) ("Lawyer advertising ... became the subject of so many cases that it developed its own distinct area of common law ... [it] has been able to seal itself off from its roots in first amendment theory ... ").

Second, the plaintiff's personal injury solicitation in *Went for It* differs radically from defense-oriented speech. In *Ficker v. Curran*, 119 F.3d 1150 (4th Cir. 1997), the Fourth Circuit rejected the argument that *Went for It* governs criminal-defense work. "Both the

First Amendment interests and the government interests in this case differ markedly from those in *Florida Bar ...* ," it ruled. *Id.* at 1155; Pruett's Cross-Petition at 19-20. *Ficker* holds that a defendant needs immediate defense of his rights, rather than a prolonged period of grieving; that a criminal case confronts a defendant not with a two-year statute of limitations but with an accelerated Speedy Trial Act calendar; that the State places the arrestee in the legal system involuntarily and compromises his privacy as a matter of public record in a criminal case, as opposed to a civil one where the plaintiff gets to decide whether to file suit or settle quietly; and that the defendant enjoys a Sixth Amendment right to counsel the State cannot properly limit. *Id.* at 1155-56.[2] *See also Babkes,* 944 F.Supp. at 912-14; TEX. ATT'Y GEN. OP. NO. JC-0022 (March 12, 1999).

On page 8 of its Petition, the Board cites *Turner Broadcasting System, Inc. v. F.C.C.,* 520 U.S. 180 (1997) to argue that alternatives to censorship were inadequate. The issue there was not whether truthful speech could be *restricted* but whether "must carry" speech could be *compelled*. *Id.* at 185. Moreover, *Turner* supports Pruett's position. "We cannot displace Congress' judgment respecting content-neutral regulations with our own, *so long as its policy is grounded*

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[2] Although *Ficker's* restriction on attorney speech lasted 30 days, Section 1704.109(b)(1)'s curtailment of bondsman speech can last for years.

on reasonable factual findings supported by evidence that is substantial for a legislative determination." Id. at 224 (emphasis supplied). No legislative record exists here, so the Board cannot vindicate this restriction.

4. Section 1704.109(b)(1) abridged the First Amendment right of Pruett's contactees to receive a truthful, non-misleading and helpful message.

Section 1704.109(b)(1) also violates the First Amendment because it denies Pruett's contactees the right to receive truthful information enabling them to avoid arrest and incarceration. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756-57 (1976) ("freedom of speech 'necessarily protects the right to receive.'"). RESPONDENTS' APPENDIX 25 at App. 80-82. Pruett has *ius tertii* vendor standing to assert his contactees' First Amendment right to receive his message. *Craig v. Boren*, 429 U.S. 190, 194-95 (1976). R. 49 at 3169-71.

C. The absence of any pre-enactment evidence of Section 1704.109(b)(1)'s purpose and the Board's admission that it lacks knowledge of that purpose precluded the Board from satisfying the *Central Hudson* test.

This Court rejects speculative, conjectural justifications for restricting commercial speech cases. In *Edenfield v. Fane,* 507 U.S. 761, 771 (1993) and *Greater New Orleans*, 527 U.S. at 188, this Court held that a government seeking to restrict commercial speech cannot prove it engaged in "careful calculat[ion of] the costs and benefits associated with the burden on speech imposed by its prohibition" by relying on conjecture and speculation. In *Thompson v. Western States Medical Center,* 535 U.S. 357 (2002), this Court noted that, "[a]lthough ... Congress conceivably could have enacted the advertising ban to advance this interest, we have generally only sustained statutes on the basis of hypothesized justifications when reviewing statutes merely to determine whether they are rational." *Id.* at 373. This Court held that, "[t]he *Central Hudson* test is significantly stricter than the rational basis test ... " *Id.*

A large majority of this nation's circuit courts interpret *Central Hudson, Edenfield, Greater New Orleans, Went for It,* and *Thompson* to require a government to prove that it relied on *pre-enactment evidence* of the government's purpose(s) for restricting speech. *See Tinsley Media, LLC v. Pickens Cty., Ga.*,

No. 05-12324, 2006 U.S. App. LEXIS 25467 at *14 (11th Cir. Oct. 12, 2006), *rhg. en banc denied*, 2006 U.S. App. LEXIS 32579 (11th Cir. Dec. 5, 2006) (unpublished), ("[w]ithout a statement of purpose in the ordinance, the state cannot satisfy the 'substantial governmental interest' requirement of *Central Hudson ...* "); *D.H.L. Assocs. v. O'Gorman*, 199 F.3d 50, 57-58 (1st Cir. 1999); *White River Amusement Pub, Inc. v. Town of Hartford*, 481 F.3d 163, 173-73 (2d Cir. 2007); *SOB, Inc. v. Cty. of Benton*, 317 F.3d 856, 862 (8th Cir. 2003); *Peek-a-Boo Lounge of Bradentown, Inc. v. Manatee Cty.*, 337 F.3d 1251, 1265-67 (11th Cir. 2003, *rhg. en banc denied*), *cert. denied*, 541 U.S. 988 (2004).

In its Petition, the Board proffers hypothesized justifications this Court rejects. Without citing the Record, the Board asserts that "[t]he purpose of Section 1704.109(b)(1) is the protection of law enforcement officers and the public from physical harm during the process of arresting an offender."[3] The Board's *post hoc* explanation contradicts its Cross-Motion for Summary Judgment, which admitted that, "[b]ecause there is no legislative history, Defendants do not have actual knowledge of the reasons that

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[3] On pages 3-7 of his Cross-Petition, Pruett argues that IFIC General Counsel Roger Moore drafted this anti-solicitation statute to assist IFIC's agents suppress competition from bondsmen sending letters and calling IFIC customers. *See also* Pruett's Appellees' Brief, at 13-14; R. 47 at 2689-92 ¶¶14-20; R. 48 at 3176-78.

§1704.109(b) was enacted." R. 35, at 1548. The Board also admitted on page 12, footnote 2 of its Appellants' Brief that, "[t]he lack of legislative history precludes actual knowledge of the reasons that Section 1704.109 was enacted."

In the absence of any pre-enactment evidence and any competent post-enactment studies, quantified statistics, or competent proof of injuries caused by ***independent***-bondsmen, the Board failed the *Central Hudson* test. RESPONDENTS' APPENDIX 26 at App. 91-94 and APPENDIX 27 at App. 98-102 and 113-16. "[T]here is no data showing that in those instances where a person becomes aware of an outstanding warrant they flee or obstruct justice," the district court concluded, "[and] no evidence of an occurrence involving an arrestee who, after being alerted to an existing arrest warrant by a bail bondsman, subsequently injured an officer." BOARD APPENDIX 2, at App. 48-49.

D. Even if *post hoc* justifications and post-enactment evidence *were* admissible, the Board failed to bear its *Central Hudson* burden of proving that Section 1704.109(b)(1) is constitutional.

1. The Board failed to quantify any risk of subsequent criminal conduct.

The Board failed to bear its burden of defending Section 1704.109(b)(1) under the third element of *Central Hudson's* test. In *44 Liquormart,* this Court

held that restrictions that provide only a "remote" or "marginal" degree of protection fail the *Central Hudson* test. *See also Bad Frog Brewery, Inc. v. New York State Liquor Authority*, 134 F.3d 87, 89 (2d Cir. 1998) (a law that "makes only a minor contribution to the advancement of a state interest" does not advance a state interest).

"Harris County witnesses testified that they knew of no instances where bondsman solicitation had caused a problem, and the bondsmen's main expert witness testified similarly." Rehearing Opinion, BOARD APPENDIX 1 at App. 12; R. 36 at 1636-38. Sheriff's Sergeant Bruce Carr knew of no risk-quantification, statistics, or actual harm, though he had searched since 1997. R. 1 at 488 and 493-94; RESPONDENTS' APPENDIX 26 at App. 91-94. Neither did Sergeant Larry Hall. R. 40 at 2146 (Deposition pp. 31-34). Nor the Houston Police Department. R. 43 at 2368-70, 2369 Item 3. Harris County District Attorney Chuck Rosenthal's designee on the Board, Kathy Braddock, knew of no quantification of risks, destruction of evidence, or harm. RESPONDENTS' APPENDIX 27 at App. 98-101. IFIC's General Counsel Roger Moore knew of no instance where solicitation by IFIC agents led to injury or death. R. 45 at 3030-32. Neither did former Board member and former IFIC agent David Schmidt. R. 50 at 3383-86. The Board justified this law on the basis of a conjectural risk the Legislature never considered.

In its *post hoc* justifications the Board identified one of many risks law officers face–but it never

quantified the potential for subsequent criminal acts. In *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), this Court required quantification: "[W]hile the Government asserts that the images can lead to actual instances of child abuse ... the causal link is contingent and indirect. The harm does not necessarily flow from the speech, but depends upon some unquantified potential for subsequent criminal acts." *Id.* at 250. *See also Playboy,* 529 U.S. at 822 (with no field survey and a "handful of complaints," the government could not show a real problem).

Criminals kill policemen with knives, guns, and cars, but those risks cannot justify bans on cutlery, shotgun, and automobile *advertising*. In *Dunagin v. City of Oxford*, 718 F.2d 738 (5th Cir. 1983) (*en banc*), *cert. denied*, 467 U.S. 1259 (1984) and in *Eimann v. Soldier of Fortune Magazine, Inc.*, 880 F.2d 830 (5th Cir. 1989), *cert. denied*, 493 U.S. 1024 (1990), the Fifth Circuit predicted that, "[t]he commercial speech doctrine would disappear if its protection ceased whenever the advertised product might be used illegally. Peanut butter advertising cannot be banned just because someone might someday throw a jar at the presidential motorcade." *Dunagin*, 718 F.2d at 743; *Eimann,* 880 F.2d at 837.

Pruett's expert, Alvin W. Berry, declared that he had "received no information that either HCBBB [the Board] and/or the State ha[d] ever quantified a risk to law enforcement personnel that shows that the alleged dangers of telephone and mail solicitation

of unserved-warrants ... " *Id.* at 1794-95 ¶32 and 1798-99 ¶¶41-43. Mr. Berry, an FBI Special Agent from 1965 through 1989, taught at the FBI Academy and planned the service of arrest warrants. R. 40 at 1784-87. He demonstrated how the Board's experts knew of no instance of anyone harmed by the speech of a bondsman. *Id.* at 1795-98 ¶¶34-40.

Moreover, the Board failed to prove that isolated incidents referenced in the Fifth Circuit's footnotes were *restriction-relevant* to independent-bondsmen calls. The Board's conclusory, *ipse dixit* affidavits, filed without expert disclosures required under Federal Rule of Civil Procedure 26(a)(2) and without underlying offense reports describing those "offenses," violated Federal Rule of Civil Procedure 56(c) and Federal Rules of Evidence 401-04(a), and did not distinguish disfavored bondsman whose speech Section 1704.109(b)(1) restricts from "existing business relationship" bondsmen entitled to speak freely. R. 52; R. 53.

The Board's evidence was not *chronologically relevant,* either, because it did not show that independent bondsmen had caused harm since District Clerk Charles Bacarisse introduced his 48-hour blackout on information about unserved arrest warrants in 2000. "Given the public's ease of access to JIMS, Harris County waits 48 hours after an arrest warrant is issued to post the information about the warrant on JIMS, allowing law enforcement officers to execute the warrant first." BOARD APPENDIX 1 at

App. 12-13. The scare-stories the Board cited "occurred before the institution of the 48-hour JIMS window." *Id.* "Presumably such a suspect would be targeted, and hopefully caught, within the 48-hour period preceding posting on JIMS." *Id.* at App. 12-13.

In the absence of studies, statistics, or real injuries caused by ***independent***-bondsmen who do not have an "existing business relationship" with a criminal-defendant or his family, the Board did not bear its *Central Hudson* burden of proving that Section 1704.109(b) benefits anyone. *See Bad Frog Brewery,* 134 F.3d at 89.

2. This underinclusive, overbroad law prohibits Pruett from contacting tens of thousands of misdemeanor defendants so harmless they learn of unserved arrest warrants through letters from Sheriff's clerks, policemen, and constables; press releases; defense attorneys; existing-business-relationship bondsmen; journalists; assistant district clerks; and the Justice Information Management System's 5,700 terminals and 1,050 printers.

These bondsmen face a Board entrusted with the power to destroy their livelihoods for providing citizens with the same public record information that deputies, clerks, policemen, constables, defense attorneys, "existing business relationship" bondsmen, and

journalists routinely provide. Most warrants involve misdemeanors that pose no threat to anyone. County law officers send thousands of letters every year to these defendants.

An April 2, 2002 letter from the Sheriff to a defendant accused of a misdemeanor, Jon Klemm, exemplifies those letters: "[A] warrant has been issued for your arrest. This notice is being sent to give you an opportunity to avoid the embarrassment of being arrested and placed in jail. You should contact your Attorney or Bondsman at once." RESPONDENTS' APPENDIX 13 at App. 40-41; R. 40 at 1809 ¶66 and 2158. Five night-clerks (who are not peace officers) in the Sheriff's Warrants Division send 7,300 to 36,500 letters every year. BOARD APPENDIX 1 at 15 n.26.

Those defendants pose no threat to law enforcement and who, if given prior notice that there is an arrest warrant out for them, will voluntarily come in and save the Sheriff's deputies the "hassle of having to go out and serve them ... " R. 1 at 233, Deposition p. 37, lines 8-15. The Houston Police Department sends similar letters. RESPONDENTS' APPENDICES 9 and 14 at App. 25-26 and 44-45. Constables send similar letters. BOARD APPENDIX 1 at 15 n.27; R. 47 at 2808; RESPONDENTS' APPENDICES 15-17 at App. 40-48.

The Texas Legislature could have easily minimized these First and Fourteenth Amendment issues by including the following language: "No county bail bond board can suspend or revoke the license of a

bondsman who contacts a defendant who receives notice of a specific, unserved arrest warrant from a law enforcement agency." But that would not have furthered IFIC's anti-competitive agenda.

After the 48-hour JIMS blackout, the District Clerk provides names of defendants with unserved warrants to anyone who calls, visits, or accesses a JIMS terminal. RESPONDENTS' APPENDIX 22 at App. 63-66; R. 47 at 2700 ¶43 and 2816-22. According to the Harris County District Clerk's website, JIMS has "over 5,700 terminals and 1,050 printers." R. 1 at 151.

In Harris County, at least two dozen attorneys mass-mail letters to notify defendants of unserved warrants that appear on JIMS. RESPONDENTS' APPENDIX 9 at App. 23-26 and APPENDIX 23 at App. 67-71; R. 41; 42 at 2236-2343. In *Scham v. District Courts Trying Criminal Cases,* 967 F.Supp.2d 230, 231 (S.D.Tex. 1997), *aff'd in part on other issues*, 148 F.3d 554 (5th Cir. 1998), the district court referred to a "deluge" of "direct-mail solicitations targeted at criminal defendants" in Harris County. Section 1704.109(b) does nothing about this deluge of lawyer-letters. That law does not materially address the alleged problem of "tipping" defendants about warrants.

Section 1704.109(b)(1) authorizes "existing business relationship" bondsmen to notify repeat-offender customers of unserved arrest warrants. This speaker-specific discrimination undermines the effectiveness

and rationale for Section 1704.109(b)(1)'s speech restriction. R. 40, at 1810-12. When asked about an anti-solicitation rule with an "existing business relationship" exception, Board Local Rule 24, Detective Bill Harwell testified that he did "not see where Rule 24 helps a peace officer at all." R. 51 at 3486-87 and 3555-64. Board expert Braddock agreed that Detective Harwell could reasonably reach that conclusion. RESPONDENTS' APPENDIX 27, App. 111-15. Deputy Jones testified that repeat offenders, the clients of "existing business relationship" bondsmen, pose the greatest threat to law officers. RESPONDENTS' APPENDIX 21 at App. 60-61.

The statute is also ineffective against "tipping" because it does not prevent anyone from telling a defendant about a Class C warrant for a Texas Penal Code §22.01(a)(2) offense of intentionally threatening another person, including a spouse, with imminent bodily harm; a §22.01(a)(3) offense of assault; and a §22.08 offense of aiding suicide. R. 40, at 1810-11 ¶70.

E. The Fifth Circuit correctly concluded that "other, less-restrictive and more-tailored means exist" to protect the police and public.

On page 9 of its Petition, the Board assails the Fifth Circuit for "requir[ing] as a condition for constitutionality of the statute an arbitrary cutoff of the statute's protection, say four or five days ... " The

Board's argument is hyperbolic. The district court correctly concluded that,

> [T]here are numerous alternatives to the total prohibition against contacts with subjects of unexecuted arrest warrants. For instance, the county could increase the number of officers executing arrest warrants, thereby arresting offenders before the 48-hour JIMS window expires. Alternatively, officers could extend the JIMS blackout period from 48 hours to some longer period in order to give authorities enough time to execute the risky warrants.

BOARD APPENDIX 2 at 49-50. "[S]ome of the County's own witnesses testified that giving law enforcement 72 or 96 hours or so after an arrest would greatly serve the County's stated interest." BOARD APPENDIX 1 at 15.

In *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002), the government did not prove that its restriction was narrowly tailored. It failed to show "any reason why these [non-speech] possibilities, alone or in combination, would [have been] insufficient to prevent compounding from occurring on such a scale as to undermine the new drug approval process. Indeed, there is no hint that the Government even considered these or any other alternatives." *Id.* at 373. To satisfy *Thompson*, the Board had to prove that Section 1704.109(b)(1) "was a necessary as opposed to merely convenient means of achieving its interests," for "it is well established

that 'the party seeking to uphold a restriction on commercial speech carries the burden of justifying it.'" *Id.* "If the First Amendment means anything, it means that regulating speech must be a last–not first–resort. Yet here it seems to have been the first strategy the Government thought to try." *Id.*, citing *Edenfield,* 507 U.S. at 770.

The same logic applies here. Pruett's expert, ex-FBI agent Alvin Berry, detailed how law officers could readily reduce risks by extending the JIMS blackout from 48 to 72 or 96 hours. R. 40 at 1810-22. The Legislature never considered those local means of protecting the police and public. RESPONDENTS' APPENDIX 27 at App. 106-07. Contrary to the Board's argument, that alternative is adequate. Detective Fitzgerald admitted, "I don't see a problem with that at all" when asked if the JIMS system could not be modified to extend the 48 hour blackout to 72 hours. R. 40 at 2129, Fitzgerald Deposition, p. 44.

The Sheriff could also modify his notice-letter procedure so bondsman could contact the same defendants: "I don't see why not," Fitzgerald testified. *Id.* at 2130, Fitzgerald Deposition, p. 49. Five days "would give us sufficient time" to serve warrants because "the majority of them we catch in five days." *Id.* at 2129-30, Deposition pp. 45-46. When asked if law officers would face danger from bondsmen contacting defendants who receive the Sheriff's notice letters, Fitzgerald replied, "To be perfectly frank, no." *Id.* at 2130.

Harris County prosecutors can ask judges for orders protecting witnesses and victims under Texas Code of Criminal Procedure article 17.291, which authorizes "further detention of certain persons," article 17.292, which authorizes an "Order for Emergency Protection"; article 17.40, which imposes "conditions related to victim or community safety" on any bail bond; and article 17.41, which imposes protective conditions when a child is the alleged victim. R. 36 at 1641-43; R. 49 at 3179-84.

Finally, the Gulf Coast Violent Offenders Task Force's financial resources are available to assist Harris County law officers track down and arrest dangerous defendants within the 48-hour JIMS blackout. RESPONDENTS' APPENDIX 24 at App. 72-79; R. 43 at 2388-2524. Funded with $985,718, App. 74, the Task Force cleared 8,196 warrants and arrested 6,735 individuals in 2003 and 2004. *Id.* at App. 79. Its report states that, "[t]he task force has aggressively attacked the backlog of outstanding warrants on file within Harris, Galveston, and Montgomery County....").

F. Neither "common sense" nor consensus nor a long history supports a holding that Section 1704.109(b)(1) is constitutional.

The Board has asserted that "common sense" supports Section 1704.109(b)(1)'s restrictions, but the statute reflects the absence of legislative history,

studies, statistics, and on-point anecdotes. This exception-riddled statute *defies* common sense. The Board argues that it is unreasonable to expect a bondsman to know whether an individual may flee or resist arrest, but it is incomprehensible that the Sheriff's five night clerks, who mail tens of thousands of notice letters, are not peace officers and do not read deputies' offense reports. R. 40 at 1808 ¶65 and 2140-45. *If* a call about a warrant raises risks, the real danger comes from existing business relationship bondsmen and their repeat-offender clients, not first-offenders called by an independent bondsman. R. 49 at 3181-83; R. 40; R. 57 at 3852; R. 51 at 3483-88. The statute silences only a tiny fraction of those who might "tip off" defendants about unserved warrants.

Section 1704.109(b)(1) has no long history, because it was struck down when first challenged. There is no pre-enactment evidence that any consensus supported Section 1704.109(b)(1). The statute pits bondsman against bondsman. R. 62 at 3992-96. There was no consensus among law officers, either. R. 51 at 3486-87 and 3555-64. There was no consensus among contactees, either. Citizens unhappy about calls testified that a call from a "prior or existing business relationship" bondsman would annoy them as much as one from an independent bondsman. R. 51 at 3480-81, 3504. Recipients of Pruett's calls testified that they were grateful for his calls and information. RESPONDENTS' APPENDIX 25 at App. 80-82; R. 47 at 2712-13, 2884-2919.

The Board failed to bear its *Central Hudson* burden of proving that competent evidence supported its "common sense" arguments, especially the "narrow tailoring" prong. *See Pagan v. Fruchey,* 492 F.3d 766, 772-74, 774 n.6, 778 (6th Cir. 2007), *cert. denied,* No. 07-420 (Dec. 3, 2007), citing *Board of Trustees of the State University of New York v. Fox,* 492 U.S. 469, 480 (1989) ("the State bears the burden of justifying its restrictions"). The Fifth Circuit correctly concluded it was unconstitutional.

II. The Fifth Circuit correctly concluded that prevailing parties should recover reasonable and necessary attorneys' fees against a board and county that doggedly defended their right and power to ban bondsman-solicitation by suspending and revoking licenses.

A. There is no circuit split or conflict with this Court's case law, for the Rehearing Opinion reaffirmed the traditional rule that prevailing parties should recover attorneys' fees when they enjoin enforcement of an unconstitutional statute.

After granting Pruett's motion for summary judgment on May 20, 2005, the District Court Judge requested evidence of attorney's fees and costs. Pruett sought $197,895.73 in fees and expenses, citing *Hensley v. Eckerhart*, 461 U.S. 424, 430 (1983). BOARD APPENDIX 1 at App. 23. Pruett was a prevailing party

"who has been rewarded some relief by the court" that "alters the legal relationship between the parties ... " *Farrar v. Hobby*, 506 U.S. 103, 113 (1992). After the Board objected to an award of *any* fees, the district court awarded Pruett only $50,000, one quarter of the sums expended (and another $25,000 if the Board appealed). *Id.* The Fifth Circuit remanded "to allow the district court to award fees appropriate to plaintiffs' now partial success in both the district court as well as on appeal." *Id.* at App. 25-28.

The Rehearing Opinion is consistent with this Court's precedent in *Hensley,* 461 U.S. at 430, and elsewhere. It does not conflict with *Newman v. Piggie Park Enterprises, Inc.,* 390 U.S. 400 (1968) and *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240 (1975). Nor does the Rehearing Opinion conflict with rulings in the cases where the Board cites *dicta* (and double-negative *dicta* at that) and dissents in *Supreme Court of Virginia v. Consumers Union of the United States, Inc.,* 446 U.S. 719, 739 (1980). Nor is there a conflict with the cited footnote in *Kentucky v. Graham,* 473 U.S. 159, 164-65 n.8 (1985) or the ruling in *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1982).

The Rehearing Opinion comports with Fifth Circuit precedent, which properly requires an "extremely strong showing of special circumstances" to merit denial of fees to a prevailing party. It is one of several recent cases reversing denials of fees to prevailing parties. In *Staley v. Harris County*, 485

F.3d 305 (5th Cir. 2007) (*en banc*), *cert. denied* (Nov. 26, 2007), the *en banc* Fifth Circuit decided that Kaye Staley was entitled to recover fees as the prevailing party under 42 U.S.C. §1988. *Id.* at 315. Again, in *Houston Chronicle Publishing Company v. City of League City, Texas*, 488 F.3d 613, 623-24 (5th Cir. 2007), the Fifth Circuit reversed a refusal to award fees to two newspapers. *Id.* at 623-24. *See also Kirchberg v. Feenstra,* 708 F.2d 991, 998-99 (5th Cir. 1983).

The Fifth Circuit's opinion does not conflict with the fact-specific equitable tests in the cases it cites: *Déjà vu v. Metropolitan Government,* 421 F.3d 417 (6th Cir. 2005), *Williams v. Hanover Housing Authority,* 113 F.3d 1294 (1st Cir. 1997), *Raisehevich v. Foster,* 247 F.3d 337 (2d Cir. 2001), or *Abu-Sahyun v. Palo Alto Unified School District,* 843 F.3d 1250 (9th Cir. 1988).

Nor does the Rehearing Opinion conflict with other circuit court and state supreme court decisions. *See Williams v. Hanover Housing Authority*, 113 F.3d 1294, 1301-02 (1st Cir. 1997) ("The circuits are in agreement ... that defendants' good faith reliance even on settled law ... is not a 'special circumstance' warranting a denial of attorneys' fees under §1988."); *Hopwood v. State of Texas*, 236 F.3d 256, 278 (5th Cir. 2000) (approving fees under a "private attorney general" theory); *Deerfield Medical Center v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981) (plaintiffs receiving an injunction were "prevailing

parties"); *Lampher v. Zagel*, 755 F.2d 99, 104-05 (7th Cir. 1985) ("good faith" was not a sufficient defense); *Pickett v. Milam,* 579 F.2d 1118, 1121 (8th Cir. 1978) (reversing a fee denial because "[t]he purpose of section 1988 is to encourage enforcement of the Civil Rights Act by compensating those persons who bring meritorious claims."); *Martin v. Heckler*, 773 F.2d 1145, 1149-52 (11th Cir. 1985) (a state agency that enforced federal law failed to present "special circumstances" to justify denial of all fees).

B. To vindicate their power to enforce anti-solicitation restrictions and to recover a fee award against Pruett, the Board and County compelled Pruett to incur substantial attorney's fees and expenses.

Denying Pruett an opportunity to recover attorney's fees from the parties who compelled him to incur those fees would be terribly unjust. No one forced the Board to defend the statute. It could have pled that it did not know why the Legislature enacted Section 1704.109(b)(1). Instead, it leapt into the fray, striving mightily to defend its power to micromanage bondsman speech. Its answer expressly asked the District Court to "deny all relief sought by Plaintiffs and to enter judgment in their [Defendants'] favor." Supp. R. 31.

To intimidate bondsmen, the Board sought to recover fees from Pruett: "Defendants further asks [sic] that this Court award them their costs and attorneys' fees expended in defending this action under 42 U.S.C. §1988...." Supp. R. 31. Now that the Board has lost, it has the *chutzpah* to ask this Court to deny Pruett the very fee award it sought.

In the Joint Pretrial Order, the Board and County stated that Section 1704.109(b)(1) was a reasonable, constitutional restriction. R. 16 at 795 Item 5. They also announced that they "seek to see the statute enforced." *Id.* at 794 Item 3. They identified 23 witnesses in their Initial Disclosures. R. 17. Their identification of fourteen experts and production of massive (but incomplete) expert reports, R. 18 at 866-1081 and R. 26 at 1148-51, compelled Pruett to retain ex-FBI Special Agent Alvin Berry and to depose the Board's experts. The Board filed a 44-page motion for summary judgment, referencing 356 pages of exhibits. R. 34, 35.

Absolving the Board of responsibility for Pruett's fees would encourage local governments to engage in dogged defenses of First Amendment violations.

C. The Board enforced Section 1704.109(b) and chilled bondsman-speech by ordering bondsmen to comply, opening investigations, and threatening to initiate anti-solicitation actions.

The Board and County will not admit that they enforced Section 1704.109(b) against Pruett, Martin, and other bondsmen, but they did so. They did not suspend a license, as the Board did to Pruett for violating its anti-solicitation rules on February 13, 2002. R. 1 at 27-28, 107-22. Instead, they enforced, that is, sought to "compel obedience to," the statute through deterrence. *See* Brian Garner (ed.), BLACK'S LAW DICTIONARY (8th ed., 2004), at 569 (defining "enforce" as "to compel obedience to"). Along with the Sheriff, the Board commenced investigations to compel bondsmen to obey the Board's no-solicitation policy. R. 62, 63, 65, 73.

Pruett bravely confronted a continuing threat of license revocation. On July 9, 2003, Board members began preparing for enforcement actions. R. 1 at 459-65 at 465. On July 11, 2003, Board member David Schmidt sent a letter urging bondsmen to report violations. R. 47 at 2714 and 2920-23. Sheriff's Deputy Shepherd opened two investigations in 2003. *Id.* On April 13, 2005, after Justice Radack partially reversed Judge Coselli's injunction against enforcement of Board Local Rules 24 and 25, Board member Glen Strickland warned bondsmen of the Board's

intent to enforce anti-solicitation rules. R. 62, 63, 65. Even if this Court were inclined to provide guidance to lower courts about attorney's fees, the Board's actions make this case a particularly poor vehicle for doing so.

Although Pruett defended First Amendment rights, the Board's blandishments chilled speech. Martin hesitated to call or hire new workers. RESPONDENTS' APPENDIX 9 at App. 21-22 ¶32. Pruett refrained from mailing letters and asked his wife Jami not to solicit so she could continue the family business if the Board revoked his license. R. 47 at 2714-15. Jami decided not to solicit. R. 37 at 1662-64. Mike Kubosh, the Board's elected bondsman-representative in 2004, reasonably feared the Board's retaliation. R. 63 at 4034-40. This Board chilled bondsman speech.

CONCLUSION

Respondents Carl R. Pruett and Scott respectfully request this Court to DENY the Harris County Bail Bond Board's and Harris County's Petition for a Writ of *Certiorari* to the Fifth Circuit. But if this Court decides to grant the petition, Respondents request that this Court will also grant their Conditional Cross-Petition, so that this Court can review the entire case below. Respondents also request such other and further relief to which they are entitled.

Respectfully submitted,

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Attorneys for Respondents Carl R. Pruett & Scott Martin

RESPONDENTS' APPENDIX/EXCERPT 6
[USCA5 783]

[SEAL]
ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

[Address And Telephone Information
Omitted In Printing]

October 24, 2003

David A. Furlow
Thompson & Knight, LLP
Three Allen Center
333 Clay Street, Suite 3300
Houston, Texas 77002

Stamp:
RECEIVED
Oct. 27, 2003
Thompson & Knight
Houston

RE: *Carl R. Pruett and National American Insurance Co. d/b/a Allied Bonding Company v. Harris County Bail Bond Board v. International Fidelity Insurance Company an Allegheny Casualty Company;* Cause No. 2002-09290

Dear Mr. Furlow:

On October 3, 2003, pursuant to §37.006(b) of the Texas Civil Practice & Remedies Code, the Attorney General received a copy of the Plaintiffs' Original Complaint, Application for Temporary Restraining Order and Injunctive Relief and Declaratory Judgment Action in the above referenced matter.

The Attorney General believes that the real parties in interest can adequately present the issues to the court. For this reason, the Attorney General respectfully declines to participate in this case.

If I can of further assistance, please do not hesitate to call.

Sincerely,

/s/ Jeff Rose
Jeff Rose
Division Chief
General Litigation Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 463-2120

cc: Kevin Parks
Thompson & Knight, LLP

Stacey Kelly
Thompson & Knight, LLP

RESPONDENTS' APPENDIX/EXCERPT 7
[USCA5 15]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CARL R. PRUETT AND SCOTT MARTIN, Plaintiffs,	§	
versus	§	CIVIL ACTION NO. H-03-3241
THE HARRIS COUNTY BAIL BOND BOARD and HARRIS COUNTY, Defendants.	§	

PLAINTIFFS CARL PRUETT'S AND
SCOTT MARTIN'S ORIGINAL COMPLAINT,
APPLICATION FOR TEMPORARY
RESTRAINING ORDER AND
INJUNCTIVE RELIEF, AND
DECLARATORY JUDGMENT ACTION

(Filed Aug. 13, 2003)

This suit invokes federal question jurisdiction to challenge the constitutionality of the new Subsection (b) amendments to TEX. OCCUPATIONS CODE ANN. § 1704.109, effective June 20, 2003 (the "Statute"). The Statute severely restricts existing free-speech rights, including the right to communicate with their customers in person, over the telephone, through the U.S. mail, over the Internet, on signs located on billboards and on the exterior of bonding businesses,

and in the *Yellow Pages*. These unprecedented restrictions impair the right of professional bail-bondsmen to speak with the public, and limit the correlative free-speech right of bondsmen and their customers to receive information about their ability to post bond on an open warrant and to secure the release of a spouse, child, parent or other loved one from jail. The Statute's unprecedented, state-wide, content-based censorship of speech violates the First, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution, as well as Article I Sections 3, 8, 11, 13, 19, and 29 of the Texas Constitution.

Plaintiffs' complaint, application for a Temporary Restraining Order and Injunctive Relief, and Declaratory Judgment Action is outlined in the following TABLE OF CONTENTS.

* * *

RESPONDENTS' APPENDIX/EXCERPT 8

[SEAL]

ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

January 24, 2007

The Honorable
John W. Segrest
McLennan County
Criminal District
Attorney
219 North 6th Street,
Suite 200
Waco, Texas 76701

Opinion No. GA-0502

Re: Whether section 1704.304(c) of the Occupations Code, which prohibits solicitation of bail bond customers in a jail, extends to advertising or licensee information displayed on a licensee's vehicle when the vehicle is located in a county jail parking lot (RQ-0507-GA)

Dear Mr. Segrest:

You ask several questions about a bail bond licensee's display of advertising on his vehicle when that vehicle is located in the county jail parking lot.[1] You first inquire whether that practice is prohibited

[1] Letter from Honorable John W. Segrest, McLennan County Criminal District Attorney, to Honorable Greg Abbott, Attorney General of Texas (July 11, 2006) (on file with the Opinion Committee, *also available at* http://www.oag.state.tx.us) [hereinafter Request Letter].

by section 1704.304(c) of the Occupations Code. *See* Request Letter, *supra* note 1, at 2.

Chapter 1704 of the Occupations Code provides for the regulation of bail bond sureties. Section 1704.051 declares that a bail bond "board is created in each county with a population of 110,000 or more." TEX. OCC. CODE ANN. § 1704.051 (Vernon 2004). McLennan County had a population of greater than 110,000 in the last decennial census, and thus is a bail bond board county.[2] Section 1704.304 provides that "[a] bail bond surety or an agent of a bail bond surety may not *solicit* bonding business in a police station, jail, prison, detention facility, or other place of detainment for persons in the custody of law enforcement" *Id.* § 1704.304(c) (emphasis added). Your first question is whether this statute prohibits "advertising or licensee information from being displayed on a licensee's vehicle in a jail parking lot." Request Letter, *supra* note 1, at 2.

Your inquiry raises the issue of whether a jail parking lot is included within the meaning of "jail" for purposes of section 1704.304(c). As you indicate, however, resolution of that issue is not necessary to resolve your particular fact situation. *Id.* at 3. The primary issue before us is whether a bail bond licensee's

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[2] *See* U.S. CENSUS BUREAU, 2000 CENSUS OF POPULATION, STATE & COUNTY QUICKFACTS, *available at* http://quickfacts.census.gov/qfd/states/48/48309.html (McLennan County population: 213,517) (last visited Nov. 1, 2006).

display of advertising on his vehicle constitutes "solicitation," the specific activity prohibited by section 1704.304(c).

"Advertising" is not tantamount to "solicitation." Although no Texas case has squarely confronted this issue, the courts of a number of other states have done so. The New York Court of Appeals held that, for purposes of the statutes governing attorney conduct, "'solicit' means to move to action, to endeavor to obtain by asking, and implies personal petition to a particular individual to do a particular thing . . . while 'advertising' is the calling of information to the attention of the public." *Koffler v. Joint Bar Ass'n,* 412 N.E.2d 927, 931 (N.Y. 1980), *cert. denied,* 450 U.S. 1026 (1981) (citing BLACK'S LAW DICTIONARY 1248-49 (5th ed. 1979)). Likewise, the Arkansas Supreme Court distinguished the two terms in stating that "soliciting is a well-known and defined action, and advertising is an equally well-known and defined action, and they are not identical." *Carter v. State,* 98 S.W. 704, 704 (Ark. 1906); *see also Smith, Waters, Kuehn, Burnett & Hughes, Ltd. v. Burnett,* 548 N.E.2d 1331, 1336 (Ill. App. 3d 1989) ("Solicitation of legal services, as opposed to advertising, connotes a private communication directed at a person or category of persons known by an attorney to have an immediate potential need for legal services."); *Akron Pest Control v. Radar Exterminating Co., Inc.*, 455 S.E.2d 601, 603 (Ga. App. 1995) ("The term ['solicit'] implies personal petition and importunity addressed to a particular individual to do some particular

thing."). In addition, another provision of chapter 1704 of the Occupations Code indicates a distinction between "solicitation" and "advertisement." Section 1704.109(a) provides that "[a bail bond] board by rule may regulate solicitations *or* advertisements by or on behalf of bail bond sureties." TEX. OCC. CODE ANN. § 1704.109(a) (Vernon 2004) (emphasis added). We conclude, on the basis of the above-referenced authority, that section 1704.304(c) does not prohibit a bail bond licensee's display of advertising or licensee information on a vehicle in the parking lot of a county jail.

You also ask whether, "[i]f the answer to [question] number 1 is in the negative," the bail bond board may enact "a local rule prohibiting the display of licensee advertising or information on licensee vehicles that are parked in the Jail parking lot." Request Letter, *supra* note 1, at 2-3. As we have indicated, section 1704.109(a) permits a bail bond board by rule to regulate advertisements. TEX. OCC. CODE ANN. § 1704.109(a) (Vernon 2004). In order to answer your second question, however, we must simultaneously address your third question, i.e., whether any such regulation would "be violative of the First Amendment rights of licensees respecting 'commercial speech.'" Request Letter, *supra* note 1, at 3.

Currently, that portion of section 1704.104 which expressly authorizes the regulation of solicitation by bail bond licensees is under judicial review. Two conflicting judicial decisions have considered the constitutionality of section 1704.109 of the Occupations Code,

although not subsection (a) thereof. First, a state court of appeals held that, for the most part, rules regarding the regulation of solicitation that were adopted under the general rule-making authority of a bail bond board did not constitute an unconstitutional restriction on commercial speech.[3] *See Harris County Bail Bond Board v. Pruett*, 177 S.W.3d 260 (Tex. App. – Houston [1st Dist.] 2005, pet. granted). Shortly thereafter, a federal district court in Houston struck down the entirety of subsection (b),[4] holding it an

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[3] In its opinion, the court of appeals noted that the rules of the Harris County Bail Bond Board were adopted prior to the enactment of section 1704.109 of the Occupations Code. As a result, the court, noting that section 1704.109 "basically mirrors" the rules at issue, considered those rules under section 1704.101 of the Occupations Code, which provides, *inter alia*, that a bail bond board shall "supervise and regulate each phase of the bonding business in the county," and shall "adopt and post rules necessary to implement this chapter." *Pruett*, 177 S.W.3d at 267-68 (quoting TEX. OCC. CODE ANN. § 1704.101). Nevertheless, the court's conclusions regarding the constitutionality of the rules adopted under section 1704.101 are equally applicable to the constitutionality of rules adopted under section 1704.109.

[4] Subsection (b) provides:

> (b) A bail bond surety, an agent of a corporate surety, or an employee of the surety or agent may not make, cause to be made, or benefit from unsolicited contact:
>
> (1) through any means, including in person, by telephone, by electronic methods, or in writing, to solicit bonding business related to an individual with an outstanding arrest warrant that has not been executed, unless the bail bond surety or agent for a corporate surety has an existing bail bond on the individual; or
>
> (2) in person or by telephone to solicit bonding business:

(Continued on following page)

improper restriction on commercial speech under the standard of *Central Hudson Gas & Electric Corporation. See Pruett v. Harris County Bail Bond Board,* 400 F. Supp. 2d 967 (S.D. Tex. 2005). On September 1, 2006, the Texas Supreme Court granted review in the state case. Because it appears that any rule regulating advertising might be impacted by the court's decision in *Pruett*, we must decline to answer your second and third questions on the basis of pending litigation.

SUMMARY

Section 1704.304(c) of the Occupations Code does not prohibit a bail bond licensee's display of advertising or licensee information on a vehicle in the parking lot of a county jail. The constitutionality of section 1704.109, which permits a bail bond board to regulate the solicitation and advertisement of bail bonds, is the subject of current litigation.

(A) that occurs between the hours of 9 p.m. and 9 a.m.; or

(B) within 24 hours after:

(i) the execution of an arrest warrant on the individual; or

(ii) an arrest without a warrant on the individual.

TEX. OCC. CODE ANN. § 1704.109(b) (Vernon 2004).

Very truly yours,

/s/ Greg Abbott
GREG ABBOTT
Attorney General of Texas

KENT C. SULLIVAN
First Assistant Attorney General

ELLEN L. WITT
Deputy Attorney General for Legal Counsel

NANCY S. FULLER
Chair, Opinion Committee

Rick Gilpin
Assistant Attorney General, Opinion Committee

RESPONDENTS' APPENDIX/EXCERPT 9
[USCA5 2210]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CARL R. PRUETT AND	§	
SCOTT MARTIN,	§	
Plaintiffs,	§	
	§	
versus	§	**CIVIL ACTION**
	§	**NO. H-03-3241**
THE HARRIS COUNTY BAIL	§	
BOND BOARD and	§	
HARRIS COUNTY,	§	
Defendants.	§	

PLAINTIFF SCOTT ELLIS MARTIN'S
AFFIDAVIT IN SUPPORT OF PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT
AND PERMANENT INJUNCTION

(Filed Sep. 20, 2004)

THE STATE OF TEXAS	§
	§
COUNTY OF HARRIS	§

BEFORE ME, the undersigned authority, on this day personally appeared Scott Ellis Martin, a plaintiff in the above-referenced case. After being by me duly sworn, he deposed and stated, based upon his personal knowledge, as follows:

I. Affiant's background and personal knowledge.

1. My name is Scott Ellis Martin. I am a Plaintiff in this case, and fully capable of making this affidavit. I reside in Harris County, and I run my bail-bonding business – Scott Free Bonding – in Harris County. I maintain an office at 1314 Texas Ave., Suite 1120, Houston, Texas 77002, with a telephone number of 713-225-3733. I am fully qualified to make this affidavit, and have no disability requiring it to be disregarded.

II. My bail-bond license and business.

2. I use Harris County Bail Bond Board License No. 74447 – which was issued to Bankers Insurance Company by the Harris County Bail Bond Board (the "Board") on [USCA5 2211] August 24, 2002. In my bail-bond business, I act as an agent for Bankers Insurance Company. The exhibit attached to the Plaintiffs' Complaint, etc. as **PX-3** is a true copy of my bail-bonding license. In the interest of keeping this affidavit brief, my attorney has asked me to ask this Court to take judicial notice of that license.

III. My Harris County Justice Information Management System Subscriber Access Permit and the public-record Information that it enables me and my employees to obtain.

3. I have purchased a Justice Information Management System ("JIMS") Subscriber Access Permit

(the "Permit") issued by Harris County District Clerk Charles Bacarisse. It enables me and my employees to use Harris County's JIMS system.

4. My JIMS Subscriber Access Permit gives me access to public-record, arrest-warrant information concerning arrest warrants signed by judges, then entered into JIMS. I have to pay Harris County to obtain access to that database and to use that information. That information is not privileged, nor is it restricted to law-enforcement agencies.

5. Most of the warrants that affect my business's clients concern misdemeanor offenses and felony complaints that have not been indicted by a grand jury.

6. Since October 30, 2000, the Harris County District Clerk's Office has imposed a 48-hour delay in the public display of felony complaints and misdemeanor arrest warrants, to enable law enforcement agencies to arrest defendants. The 48-hour delay gives law enforcement agencies an opportunity to serve arrest warrants before the persons named on those arrest warrants can learn of their issuance.

[USCA5 2212] **IV. My employees' communications with interested members of the public in need of information about arrest warrants, jail, bail bonds, and bonding services.**

7. I employ people to let potential customers know that my business can provide them with a bail-bond,

a three-way contract between a person charged with a crime, the State (usually Harris County), and my company as surety. I do not employ lawyers, people with legal training, or people educated in persuasion to seek out or solicit bail bond business.

8. Using public-record JIMS information, my employees make telephone calls or send letters to citizens when the JIMS system reveals that the citizen's son, daughter, spouse, parent, or other loved one has been arrested and is eligible to leave jail by posting bond. My and my employees' phone calls and letters notify citizens about misdemeanor arrests, *e.g.*, that a citizen's son has been picked up for driving while his license is suspended, that a daughter was arrested for passing a bad check, or that a spouse has been jailed for driving while intoxicated. We make no phone calls and send no letters to persons that involve non-public record information.

9. I or my employees have made telephone calls and send form notice letters to notify concerned individuals of their constitutional right to post bond, the fact that bondsmen will post a bond, the option of posting a cash bond, my availability to assist interested consumers in bond posting, the citizen/defendant's next scheduled court appearance, and other information that may be available through the JIMS public-information database. Most of the time, my employees and I usually make our phone calls during ordinary business hours, especially since I learned through my attorney's discovery requests that Sheriff's deputies

were investigating complaints against my fellow Plaintiff Carl Pruett in the Spring of this year.

[USCA5 2213] 10. In our letters and in our phone calls, my employees and I tell potential customers that they have a range of options when it comes to posting bond, including (a) Posting a cash bond; (b) posting a surety bond; or (c) doing nothing and waiting until the court takes some action when the party-defendant goes to court. My employees and I occasionally answer basic questions regarding the Harris County criminal court system. Some of this speech is commercial, and reflects an effort by me and my employees to transact business with potential customers. Much of the information that I and my employees provide to potential customers is not commercial, though. It concerns important matters of public importance, such as the citizen/consumer's right to post bond, the charge against him, the next date/setting of a case, and the like.

11. My customers have frequently expressed their gratitude to me for calling or writing, and have stated that my business's call or letter was that person's first notice of an open warrant, or the jailing of a parent, spouse, or child. Most customers' statements and demeanor indicate that they are grateful for the phone call or letter.

12. My employees and I have also made telephone calls and have sent letters to citizens who have unserved arrest warrants publicly listed on HMS' web site bond records. These phone calls reside

citizens to avoid the humiliation of arrest, incarceration, assault, and injury during arrest or incarceration.

13. I and my employees have made and still make phone calls, and have made and still send letters, to solicit bonding business related to an individual with an open arrest warrant, and with a set bond amount, who has not been indicted.

[USCA5 2214] 14. After June 20, 2003 and before the filing of this lawsuit, I and my employees made phone calls to solicit bonding business between 9 p.m. and 9 a.m. Months after the filing of this lawsuit, I instructed my employees not to make telephone calls to potential customers after 9:00 p.m. (my employees had not made phone calls after 10:00 p.m., anyway). My employees still make occasional phone calls to solicit bonding business between 8:00 a.m. and 9:00 a.m. My employees and I prepare and send letters to solicit bail bond business at all times of the day and into the early evening between 8:00 a.m. and sometimes after 9:00 p.m. (usually to wrap up a long day's work).

15. My employees and I occasionally make phone calls and routinely send notice letters to solicit bail bond business within 24 hours after a defendant's arrest.

16. My employees and I make these phone calls or send these letters to give a prospective customer an opportunity to avoid going to jail, if the prospective customer has an open warrant, and to give a

parent, a spouse, or a child the earliest opportunity to post bond for a jailed love [sic] one and thus minimize that loved-one's time in jail.

V. Steps I and my employees take to minimize danger to third parties.

17. My employees and I take reasonable steps to minimize any danger that our activities might pose to other persons. First, in making our calls and sending our letters, we trust to the discretion of Harris County's law-enforcement officers, prosecutors, and magistrates to use pocket warrants, sealed-indictments, high-dollar-bonds, and other measures to exclude certain arrest warrants from JIMS when necessary to protect the police or public, which restricts Plaintiff's letters and calls to situations where the law enforcement community has had the opportunity to protect policemen and the public.

[USCA5 2215] 18. Second, my employees and I adhere to the JIMS system's 48-hour blackout of arrest record information, which gives the police an adequate time to serve arrest warrants on defendants who might present dangers to the police or particular persons.

19. Third, I have prepared and instructed my employees to follow the script and procedures set forth in his "Scott Free Bonding Solicitation Addendum," which is attached hereto as MARTIN EXHIBIT 1 (which I produced in discovery as PH[07/01 000441).

20. Fourth, my employees and I do not make contact with citizens if there is no possibility of a bond. We decline to contact persons listed as having a bond set at "$0," that is, "no-bond" defendants on JIMS, so every person who receives one of our letters or phone call has already had his case reviewed resulting in a determination by a magistrate or law-enforcement officer that the defendant/person is entitled to avoid jail or obtain his/her release from jail by posting bond.

21. Fifth, my employees and I generally refuse to mail letters to, call, or otherwise communicate with persons who have bonds for more than $20,000.00 on JIMS, which limits any alleged danger that information about an arrest warrant will go to someone who cannot post bond.

22. Sixth, my employees and I choose not to mail letters to, call, or otherwise communicate with persons who have been charged with one or more of the following offenses: (a) Indecency with a Child; (b) Sexual Assault (of any kind); (c) Kidnaping [sic]; (d) Assault of a Police Officer; or (e) Animal Cruelty. I have included animal cruelty in the list because I don't like people who are mean to animals and I think that it may indicate that they will also be cruel to humans.

[USCA5 2216] 23. Seventh, my employees and I insist that persons who use our bail-bonding services agree ahead of time to obey the conditions set by the State for the bond in question. This means making sure that our customers understand and agree to

comply with a judge or magistrate's orders or conditions barring the bonded-accused from issuing threats, committing violence against, stalking, or communicating with the alleged victims of their crime and/or witnesses. I understand that judges can enter those orders to protect people under Articles 17.292 and 17.41 of the Texas Code of Criminal Procedure.

24. Eighth, my employees and I will promptly respond to any accused person who threatens the life or safety of a person or to law-officer, or who talks about destroying evidence or fleeing the jurisdiction, that he should let the courts handle the matter and that he'll get tracked down if any [sic] runs. We will tell any such customer that any retribution against a victim, complainant, or witness will result in more serious charges being filed against him.

25. Ninth, my employees and I never reveal the existence of a warrant or an incarceration to a child or neighbor.

26. Tenth, my employees and I will promptly notify Harris County law-enforcement officials if a bail-bond customer or a contactee makes a threat to the life or safety of a particular person or to law-officers.

27. Eleventh, my employees and I tell any defendant who posts bond through us that he or she must regularly appear at all hearings and at trial. We require that defendant to regularly check in with our company. And we keep track of that defendant's appearances, to ensure that he or she performs the

conditions of his bond. We will notify law-enforcement [USCA5 2217] officials if that defendant states that he is going to flee the jurisdiction, harm a law-enforcement officer or other person, or destroy evidence.

VI. My and my employees' honesty with the people we contact.

28. I am honest with potential customers, and expect and instruct my employees to be honest when they talk with members of the public, including anyone who might become a customer.

29. I do not use, nor tolerate any employee's use of, high-pressure tactics to sell bail-bonds. I offer, and ensure that my employees merely offer, my business services if the prospective customer seems to be interested in using them.

30. I want customers to come back to my business on future occasions, instruct my employees to treat the people they call with candor and courtesy, and monitor my employees' performance to make sure that my instructions are carried out.

31. My employees and I answer any questions that fall short of being legal advice, and provide those members of the public with any information available to the general public through the Harris County JIMS public-record database.

32. I know that I am risking my license to assist my clients to obtain bail. I fear that this or a subsequent

Harris County Bail Bond Board will seek to suspend or revoke my license for communicating truthfully with members of the public about bail bonds. In the past, I would not have hesitated to hire new workers to make phone calls and send out letters. Now I hesitate. With this new statute in effect, I hesitate to hire more workers to make phone calls and send letters because of my fear that I will make myself a larger target for this Board. I would like this Court to strike down the Statute so I can speak and write in peace.

[USCA5 2218] **VII. Authentication of the letters and brochures my business sends to prospective customers.**

33. I and my employees send letters and brochures to prospective customers who have unserved arrest warrants or loved ones in jail. A true and correct copy of one of the letters I and my employees send to prospective customers is identified and attached to this affidavit as **MARTIN EXHIBIT 2** (it was attached to Plaintiffs' Original Complaint as PX-24). It references the cause number of the citizen's case, the court number, the charge (here, theft by check, a typical charge in an open warrant case), the fee for my services, and other pertinent information.

34. I also send citizens a brochure with public-interest information about the justice system and the types of bail bonds that are available. I provide that information so that customers will have pertinent

information about the bonding decision. A true and correct copy of a brochure I send to prospective customers is identified and attached as **MARTIN EXHIBIT 3** (it was attached to Plaintiffs' Original Complaint, etc. as PX-25).

VIII. Attorneys' use of Justice Information Management System public-records in criminal-defense solicitation letters concerning arrest warrants and incarcerations.

35. In addition to working as a bail-bondsman, I own a business that participates in the direct-mailing of attorney solicitation-letters to members of the public most likely to be interested in retaining their services. That business is known as Pronto Direct Mail Marketing. I have worked in that business here in Harris County for thirteen years, and I am thoroughly familiar with that business and the attorneys who use that and competing direct-mail marketing services.

[USCA5 2219] 36. I assist approximately twenty-five (25) attorneys in preparing mass-mailings by criminal-defense attorneys. Those attorneys use the Harris County Justice Information Management System's public-record databases regarding arrests and incarcerations to develop addressee lists in order to win new potential business.

37. I have reviewed the stack of over thirty criminal-defense attorney and bail-bondsman notice

letters that Daisy Howard received after she was charged with felony theft in September of 2003. A true and correct copy of a brochure I send to prospective customers is identified and attached as MARTIN EXHIBIT 4.

38. That stack of letters is consistent with my knowledge of the way criminal-defense attorneys in Harris County market their services to potential customers, that is, to criminal defendants in need of counsel. I recognize many of the names, signatures, and letterheads of the attorneys in that stack of documents. Some of them are customers of my business Pronto Direct Mail Marketing. I mail some of those attorneys' solicitation letters, and with others I provide an e-mail list of defendants based on JIMS information that those attorneys utilize in making their own mass-mailings.

39. I can authenticate the letters of these customers of Pronto Direct Mail Marketing (and in some instances, my mail-outs) among the attorneys whose letters appear in MARTIN EXHIBIT 4: Jonathan Paul (I handle his mail-outs and mailed this one); Natasha Sinclair (she receives the e-mail list she uses to prepare her own mail-out); Tyler "Flash" Flood (I handle his mail-outs and mailed this one); Logan Deetz (e-mail list); Muharib, Knowles & Associates (a current customer whose letterhead and form I recognize, though I did not handle their mail-outs in September of 2003); Shannon Sherman Tonry (I handle [USCA5 2220] the mail-out and sent this one); David P. Ward and the Ward Law Firm (I handle his

mail-outs and mailed this one); the Law Offices of Brett Podolsky & Associates (I mailed his letter); Diana Sims (I mailed her letter); Paul Weinstein (I mailed his letter); Michael Slider (e-mail list); Mark Holsworth (e-mail client); Patrick Kelly (a current e-mail client whose form and letterhead I recognize, though he was not yet a client in September of 2003); Rick Castleberry (I handle his mail-outs, and mailed this letter); Chaun D. Hubbard (an e-mail client); Benavides & Kelly (I handle their mail-outs); Jim Medley (an e-mail client whose form and letterhead I recognize); and Brian Overstreet (an e-mail client).

40. Based on my background and experience in the mass-mail-marketing business here in Harris County, Texas, I am not surprised that a person charged with the crime of theft in Harris County received over thirty letters from criminal-defense attorneys and bail-bondsmen soliciting employment.

41. The solicitation-letters I send usually go to misdemeanor defendants. These letters are similar to the misdemeanor-defendant notice letters that the Harris County Sheriffs Department sends to misdemeanor defendants, and the April 6, 2004, Houston Police Department letter to Sergio Soto I was given after Sergio Soto received that letter from Alan K. Kays, Sr., an Officer/Investigator in HPD's Burglary and Theft Division. In that letter, Officer Kays advised Mr. Soto that he had "been charged with misdemeanor theft" for a theft of doors from a construction site. The letter says, "In order to avoid arrest, you need to contact a bonding company and

post a non-arrest bond." A true and complete copy of that letter, produced as it was given to me, is attached as **MARTIN EXHIBIT 5**.

42. And further Affiant Sayeth Not.

[USCA5 2221] **By:** /s/ S E Martin
Scott E. Martin

SWORN TO AND SUBSCRIBED before me, the undersigned notary public, to certify which witness my hand and seal of office, this 20th day of September, 2004.

/s/ William T. Hurley
Notary Public in and for
the State of Texas

My Commission Expires:

_____

[SEAL] WILLIAM T. HURLEY, JR.
MY COMMISSION
EXPIRES
October 9, 2004

RESPONDENTS' APPENDIX/EXCERPT 10
[USCA5 2223]

Scott Free Bonding
Solicitation Addendum

In our efforts to assist the public in their bail bonding needs, we must strictly adhere to the following policies:

- Begin your phone calls with:

Hi, this is _____ with Scott Free Bonding calling in regards to _____. Do you know _____? What is your relationship to _____. Were you aware that _____ is currently incarcerated in the Harris County Jail? Well, this is a courtesy call to offer you our assistance in bonding _____.

Or this for warrants

Hi, this is _____ with Scott Free Bonding, could I speak with _____? I'm calling because public records indicate that you have been charged with a criminal offense and a warrant has been issued for your arrest. Were you aware of that? I was calling to help you post a bond without being arrested . . .

- Make no calls to defendants with open warrants that have a bond set at $0.
- Make no calls to defendants with open warrants that have a bond amount that exceeds $20,000.00
- Make no phone calls to defendants with open warrants that are charged with: Indecency

w/ Child, Sexual Assault of any type, Kidnapping, Assault of a Police Officer, Animal Cruelty, or any violent felony offense.

- When calling a defendant with an open warrant that becomes angry that a charge has been filed, you should advise them to let the courts handle the matter now and that any retribution against a victim, complainant, or witness will result in more serious criminal charges against them.
- Make no solicitation calls between the hours of 9:00 p.m. and 8:00 a.m.
- Never reveal the nature of the solicitation to a child or neighbor.
- When leaving voice messages just leave your name and phone number and say that you are with Scott Free Bonding and calling about _____.

RESPONDENTS' APPENDIX/EXCERPT 11
[USCA5 2225]

***Scott Free* Bonding**
1314 Texas Ave., Suite 1120
Houston, Texas 77002
713-225-FREE [3733]
License #74447

HABLAMOS ESPANOL

Patsy Hernandez	Case #: 1185834
xxx xxx xx	Court: 11
xx xx	Offense: Theft by Check
xxxxxx xx xxxxx-xxxx	Bond Amt: 500

What are all the letters for?

You have received many letters from attorneys and other Bail Bond Companies. That's because public criminal records indicate that a warrant has been issued for your arrest. If a bond has been set, that means that you could post a "non-arrest" bond and avoid being arrested unexpectedly.

What are they talking about, how can I be charged with a crime when I have not been arrested?

Criminal charges have been filed against you, this much is true. Remember this is only an accusation, and you are not necessarily guilty, but there is still an open warrant for your arrest. That means that you could be arrested and taken to jail at ANYTIME. The county will only tell bonding companies basic information about your case, but if you call me I

can have your case file pulled and be able to give you a copy of the details about the charges against you. There is no additional charge for that service so you can call me at (713) 225-3733. If I am not in the office, ask for my cell phone number and call me immediately. I will be able to explain the situation better and make you feel more comfortable.

You can take care of this WITHOUT going to jail.

When there is a warrant out for your arrest, you have the option of posting a "NON-ARREST" bond. That's when you post the bond before you are arrested. With a "NON-ARREST" bond you get a court date and go home INSTEAD of sitting in jail for 8-24 hours like a person does when they are arrested.

How much will this cost?

Our fee for posting your band is $75. However, we could work out a payment plan if you don't have all of the money up front. collateral or co-signers may be required. If you find a lower price for this bond I will meet or beat it. Plus, you get my experience and knowledge on this matter.

Why should you use SCOTT FREE BONDING?

LOWEST PRICES – Check around.
BEST SERVICE – Nobody else will let you know the details of your specific case.

BEST PAYMENT PLANS – Compare our prices and terms.
MOST INFORMATION – 20 YEARS EXPERIENCE
FRIENDLIEST OFFICE – Get treated like a customer instead of criminal

Sincerely,

/s/ S. E. Martin
Scott E. Martin
Scott Free Bonding Co.

Scott Free Bonding [POSTAGE STAMP]
1314 Texas Ave. Ste. 1120
Houston, Texas 77002

[USCA5 2226]

RTS NOT DELVRBL AS ADDRSD
UNABLE TO FWD

77002/3599

RESPONDENTS' APPENDIX/EXCERPT 12
[USCA5 2228]

[Picture Omitted In Printing]

ALL ABOUT
HARRIS COUNTY
BAIL BONDS

***Scott Free* Bonding**
713-225-FREE
1314 Texas Ave. Suite 1120
Houston, Texas 77002
License #74447

[USCA5 2229] **What is a Bail Bond?**

When a person is charged with a criminal offense, they are usually arrested and placed in jail. It is the police and prosecutors job to prove that the defendant is guilty of the crime that they are charged with. However, our Criminal Justice system is built around protecting the innocent, so the system presumes that the defendant is innocent until proven guilty.

All of this proof of guilt must be determined in a Court of Law. The defendant will stay in jail until guilt or innocence is established. This can take a good while. In order to protect the innocent, our system allows for the defendant to get out of jail, while the case is pending. To get out of jail the defendant must put up cash (Bail Bond). This money is held so that the defendant shows up for all court appearances. The court will determine the amount of bail, which we will discuss later in this brochure.

Jail Bonding Vs. "Non-Arrest" Bonding

Most people charged with a crime are arrested and placed in jail. It normally takes 16 hours for a defendant to be released from the Harris County Jail on bond. 8 hours being booked in and 8 hours being booked out.

Some people are charged with a crime without being arrested. When this happens a warrant for their arrest is also issued. This means that they can be arrested at any time or any place by any police officer.

When there is a warrant for a person's arrest, that person can post what is called a "Non-Arrest" bond. This way they don't have to go to jail, but they still have to go to court to take care of the charges against them.

Types of Bail Bonds

Municipal Bonds – Municipalities are the different cities within Harris County. Houston, Pasadena, Humble, Katy, and Baytown are some of the larger cities in the County. If a city's Police Officer gives you a ticket, you're required to appear at that city's Municipal Court on a certain date. If you fail to appear in court or pay off the ticket, then a warrant for your arrest is issued for failure to appear and the original ticket(s). You can post a Non-Arrest bond or wait until you get arrested. These are Class C misdemeanors.

J.P. Bonds – J.P. stands for Justice of the Peace. There are 16 J.P. courts in Harris County. Two judges in 8 precincts. Each precinct has its own Constable's Office. The Deputy Constables write tickets just like a City Police Officer does. You have to appear in court or pay off the ticket by a certain date, or warrants will be issued for your arrest. Some "Hot Checks" can also be filed in the J.P. Courts and warrants are issued for your arrest. All charges in a J.P. court are Class C misdemeanors and a Non-Arrest Bond can be posted or they can be arrested.

County Bonds – More serious crimes like Class A&B Misdemeanors and Felonies are filed by law enforcement agencies in Harris County through the Harris County District Attorney's Office. These cases are heard in a County Criminal Court at Law or a State District Court. Bonds can be posted when a person is arrested or a Non-Arrest Bond when there is an arrest warrant.

Appeal Bonds – Sometimes a defendant may be convicted of a crime. In some cases there are grounds for an appeal. Generally, if the defendant receives less than a 10 year sentence, they will be eligible for an Appeal Bond. An Appeal Bond will keep the defendant out of jail during the appeal process.

Out of County Bonds – Sometimes a person could be wanted in another county, yet they get arrested in Harris County and taken to the Harris County Jail on the criminal charges from the other County. Eventually, they will be transferred to the other County, but

this usually takes a while. They can be bonded out of the Harris County Jail.

Bonding Schedule

Classification	*General Bond Amt.*
Class C Misdemeanor	$100
Class B Misdemeanor	$500
Class A Misdemeanor	$1000
State Jail Felony (4th degree)	$2000
3rd Degree Felony	$5,000
2nd Degree Felony	$10,000
1st Degree Felony	$20,000

The bond amount is established by each individual court. The courts have discretion to raise or lower bond amounts. The defendant does not have to pay the full bond amount, only a small percentage will be charged.

What Kind of Bird Don't Fly?

It's a Jailbird. Some people might think that they will just "sit it out" in jail. That may be o.k. with a traffic ticket, but on County charges, sitting in jail curing a pending case is not beneficial to the defendant. When a defendant is on bond, they can hire an attorney of their own choosing. They will also look better in their own clothes as opposed to the County's orange jump suits. We advise all defendants to dress appropriately for court and be on time with their attorney.

DISCLAIMER: Scott Martin, Bankers Insurance Company, Scott Free Bonding, and its employees are not lawyers. The owner and employees of Scott Free Bonding do have a combined 21 years experience in the criminal law field. This brochure is intended for informational purposes regarding bail bonds. It is always in your best interest to consult a licensed attorney regarding legal matters.

A Paid In Full Attorney is Your Best Defense

The attorney that you hire to represent you on a criminal charge will have a direct effect on the outcome of your case. The facts of your case also have a lot to do with it. Since jail time is a possible range of punishment on most criminal charges, you will want to defend yourself aggressively. Most attorneys perform better and quicker when they have been paid in full by the defendant or at least all payment plans are kept in a timely fashion.

You are Innocent Until Proven Guilty

This is true, it is the basis of our Criminal Justice System. But, when you are charged with a crime, even if you are completely innocent, you can still be arrested and placed in jail. You would still have to post a bond, and would be wise to hire an attorney to defend your innocence. It may not seem fair that you will be out the money and wasted time, but since it's

impossible to have a perfect system, some people will be caught at a disadvantage.

The Bail Bond Company

Scott Free Bonding is a full service bail bond company licensed in Harris County, License #74447. All licensed bail bond companies can post a bail bond in Harris County. The bonding company you choose has NO bearing on the outcome of your case, only your attorney can make a difference.

There are some differences in Bail Bond Companies though. Some companies may treat you like a criminal. Some companies will charge as much money as they can get, especially if you don't have much experience with bail bonding. Most companies make you do all the legwork.

At Scott Free Bonding, we are dedicated to our customers. We treat defendants, their families, and, friends with respect. The owner of the company, Scott Martin, is available to personally answer your questions. We guarantee the lowest prices. We will do the legwork for you, except for outlying jails. If there is a warrant for your arrest, we will find out details of the case, so that you can have a better idea of what you are being charged with before you go to court. Some bonding companies will surrender your bond for dumb reasons. Scott Free Bonding will stand by your bond as long as you meet our easy to follow rules.

Hopefully, you don't need a bonding company every day, but when you do need one, we will be here for you and your friends. We promise to make the bonding experiences as easy as [illegible] possible.

RESPONDENTS' APPENDIX/EXCERPT 13
[USCA5 2153]

OFFICE OF THE SHERIFF
Harris County

[SEAL]

TOMMY THOMAS, Sheriff

Houston, Texas 77002

JIMS484

JONATHAN KLEMM DATE: 04/02/02
xxx xxx xxx
xxxxx xx xxxxx SPN: 01921598

This is to advise you that a warrant has been issued for your arrest. This notice is being sent to give you an opportunity to avoid the embarrassment of being arrested and placed in jail. You should contact your Attorney or Bondsman at once.

If you wish to post a bond directly with the Harris County Sheriff's Department you must do so in person at Bonding, located on the first floor at 49 San Jacinto. This office is open 24 hours a day, seven days a week.

All the information pertaining to this warrant is contained in this notice. Please call the Criminal Warrants Division at (713) 755-6055 if you wish to surrender.

CASE02
110887201010

OFFENSE: THEFT
>=$500<$1,500
BOND: $1000.00

DRIVERS LICENSE NO.: xx xxxxxxx	SOCIAL SECURITY NO.:
RACE: W SEX: M	DATE OF BIRTH: xx/xx/xx
FBI:	STATE I.D. NO.:

AFFIDAVIT

STATE OF TEXAS
COUNTY OF HARRIS

BEFORE ME, THE UNDERSIGNED AUTHORITY APPEARED CARL R. PRUETT, PERSONALLY KNOWN BY ME. WHO DID STATE THE FOLLOWING AFTER, BEING DULY SWORN AND PLACED UNDER OATH:

"My name is JONATHAN KLEMM. My date of birth is xx-xx-xxx My Texas Driver's License Number is xxxxxxxx and my Social Security Number xxx-xx-xxxx. I currently reside at xxxxxxx, xxxxx, xxxxx, xxxxx. My telephone number is xxx-xxx-xxxx. I am currently unemployed as I am a full-time student. I have never been convicted of either a felony or a misdemeanor involving moral turpitude in this state or any other state of the United States nor any of its territories.

I did receive one certain letter dated April 2, 2002 and post-marked April 4, 2002 from the Harris County Sheriff's Office informing me that I had an open warrant for the charge of misdemeanor Theft,

Cause No. 1108872, pending in County Criminal Court at Law No. 8 of Harris County, Texas, a copy of the same is attached hereto. I had previously retained the services of Allen Isbell for representation of the cause and Allied Bonding Agency was checking daily for the issuance of a warrant so that I could avoid the embarrassment, humiliation and inconvenience of being arrested for the charges herein. When I received the letter, I immediately contacted Allied Bonding Agency to find out why they had not alerted me to the issuance of the warrant and we discovered that the charges had erroneously been filed with my brother's date of birth, but under my name which is why Allied was not able to access the information. I posted the bail bond for the charges therein on April 7, 2002 as a non-arrest bond and was able to avoid the embarrassment, humiliation and inconvenience of being arrested.

I have read the foregoing statement and do hereby attest that all contained hereinabove is true, correct and within my personal knowledge. Further, affiant sayeth not."

Signed and executed this the 19th day of April, 2002.

/s/ Jonathan Klemm
JONATHAN KLEMM

Sworn to and subscribed before me this the 19th day of April, 2002.

/s/ D. G Tooley
Notary Public for the
State of Texas

D. G TOOLEY
[SEAL] MY COMMISSION EXPIRES
May 20, 2005

RESPONDENTS' APPENDIX/EXCERPT 14

[USCA5 2344]

[SEAL] CITY OF HOUSTON
Bill White, Mayor Houston Police Department
1200 Travis Houston, Texas 77002-6000 713/247-1000

CITY COUNCIL MEMBERS: Tora Lawrence Carol Mims Galloway Mark Goldberg Ada Edwards Addie Wisaman M.J. Khan Pam Holm Adrian Garcia Carol Alvarado Mark Ellis Gordon Quan Shelley Sekuka-Gibbs, M.D. Ronald C. Green Michael Berry CITY CONTROLLER: Annise D. Parker

April 6, 2004

Harold L. Hurtt
Chief of Police [SEAL]

Sergio Galvan Soto
xxx xxx xxx
xxxxx, xx xxxxx

Dear Mr. Soto:

You have been charged with misdemeanor theft in connection with the theft of doors from the construction site at 404 Oxford. In order to avoid arrest, you need to contact a bonding company and post a non-arrest bond. The bonding company will need the following charge information from you:

Theft (500-1500)
Cause #: 1224191
Court: CCCL 12
Bond: $100[illegible].00

Please contact me at 713.308.0979 to discuss matters further. This must be done by the end of this week.

Sincerely,

/s/ Alan K. Kays
Alan K. Kays, Sr.
Officer/Investigator
Burglary and Theft

akk:akk

HPD OR# 1351404Y

RESPONDENTS' APPENDIX/EXCERPT 15

[USCA5 2811]

Harris County Precinct Constable Criminal Warrants

HARRIS COUNTY CONSTABLE PRECINCT 1

JACK F. ABERCIA

Criminal Warrants

[Pictures Omitted In Printing]

The Warrant Division serves warrants for the Harris County Mental Health and Mental Retardation Authority, Texas Attorney General's Office, Harris County Juvenile Courts, and Precinct One's Justice of Peace Courts.

Many warrants are filed as a result of a bad check or an unpaid traffic citation, or can include theft of service and truancy, among other things. Each defendant is afforded a courtesy notice that a warrant has been issued for their arrest. If a defendant fails to respond, the warrant division goes into action. Through a variety of techniques these defendants are located and arrested.

http.//www.co.harris.tx.us/conpct1/Criminal.htm

RESPONDENTS' APPENDIX/EXCERPT 16

[USCA5 2813]

[SEAL]

[Pictures Omitted In Printing]

Home
Divisions
Civil
Communications
DARE & GREAT
Patrol
Records
Reserves
Tech Services
Training
Warrants
Information
Staff
Specialty Units
Site Search

The Warrant Division is responsible for serving Warrants and arrest fugitives in Precinct Four. Most warrants are the result of traffic violations and hot checks, and the deputies systematically locate and arrest defendants using a variety of tactics. A dramatic increase in warrant service was achieved through an innovative Computerized notification system, the product of cooperative effort between the local Justices of the Peace and the Constable. Be sure to view the Warrant Division's statistics.

[Home] [Division] [Information] [Staff]
[Specialty Units] [Site Search]
[Illegible]

2002 Harris County Constables Office, Precinct 4 –
All Rights Reserved
No part of this website may be
reproduced with permission.

Harris County Constable, Precinct 4 –
6831 Cypresswood Drive, Spring Texas 77379
281-376-3472 Fax 281-401-6290

http://www.co.harris.tx.us/pct4/html/warrants.html

RESPONDENTS' APPENDIX/EXCERPT 17

[USCA5 2808]

Warrant Division

[Picture Omitted In Printing]

The Precinct 8 Warrant Division is responsible for clearing all warrants generated through the two Justice of the Peace Courts within our precinct. Most of these warrants are filed as a result of a bad check or an unpaid traffic citation. Precinct 8 affords each defendant with a courtesy notice that a warrant has been issued for their arrest. If a defendant fails to respond, the warrant division goes into action. Through a variety of different techniques these defendants are located and arrested.

> The warrant division has a slogan, which we continue to prove each day, "*You can run, but you can't hide . . .*"

[Patrol and Traffic] [Criminal Warrants] [Civil]
[Toll Road] [Astronaut Support] [Employment]
[Houston Traffic] [Local Weather]
[Interesting Links] [Website Awards]

http://www.co.harris.tx.us/pct8/warrants.htm

RESPONDENTS' APPENDIX/EXCERPT 18

[USCA5 1951]

Warrants

[SEAL] **Harris County Sheriff's Office**
home | bureaus | resources | employment | contact | site map

Bureau Menu

Detective "
Detention "
Executive "
Human Resources "
Patrol "
Public Services "
Support Services "
Technical Services "

HOW TO REPORT A WANTED PERSON

1. Never approach a person you believe is wanted for a crime.
2. Contact the Harris County Sheriff's Office Warrants Division at 713-755-6055 or Crime Stoppers at 713-222-TIPS (8477) and provide them with the information you have.
3. You may provide information on either the Harris County Sheriff's Office Tip Link or the Crime Stoppers Link, or both.

More

- Warrants Home
- Most Wanted Felons
- Runaway Juveniles
- Victim's Assistance
- Links

WANTED

[Pictures Omitted In Printing]

Arnoldo Cadenas #0919611 W/Male 5'03" 145 Murder	Jorge Valtierra #0973999 W/Male 5'08" 165 AGG Robbery-Deadly Wpn	Choon Jung #0835142 A/Male 5'08" 150 Sex Asslt Child 14-17	Armando Rayos, Jr. #0890844 W/Male 5'05" 160 AGG Sex Asslt Child Under 14	David Hernandez #0897049 W/Male 5'09" 130 AGG Robbery-Over 65 or Disabled
Mario Duron #0918424 W/Male 5'09" 130 AGG Kidnapping	Gregory King #0926937 B/Male 6'00" 210 AGG Assault W/Deadly Weapon	Rajesh Kasi #0938909 W/Male 5'05" 170 AGG Assault W/Deadly Weapon	Frederick Monroe #0917305 B/Male 5'06" 165 AGG Sex Asslt Child Under 14	Rogelio Mora #0924378 W/Male 5'10" 165 Capital Murder

Copyright 2004 [Illegible] Terms Of Use

http://www.hcso.hctx.net/detective/warrants/wanted.asp

RESPONDENTS' APPENDIX/EXCERPT 19

[USCA5 2069]

[SEAL] **Harris County Sheriff's Office**

home | bureaus | resources | employment | contact | site map

Press Menu
Public Information Office
Homicide
Traffic
Search Past Releases

[SEAL]

Homicide News Release

Type of Case: Shooting INvestigation

Case #: 04-0526-0142

Offense Date: 5/26/2004 1:55:00 AM

Location: 14,022 Walters Road 331X

Complainant: Espinoza, Ernesto H/M 32YOA DOB-xx/xx/xx Escamilia, Juan H/M 27YOA DOB-xx/xx/xx

Suspect/Defendant: 2 unknown B/M's

Notification of Next of Kin: N/A

Person Notified: N/A

Date of Release: 5/26/2004 10:10:00 AM

Approved for Release: B. E. Williams

Details: Harris County Sheriff's Deputies responded to a shooting at 14,200 Walters Road. Upon arrival at the scene deputies found a thirty two year old hispanic male with a gunshot wound to the head. The male was transported to Ben Taub Hospital where he is undergoing surgery at this time and is listed as very critical. Another hispanic male 27 years of age was transported to Houston Northwest Medical Center where he was treated and released. Investigation revealed that complainants were involved in some type of verbal altercation at nearby gas/convenience store. Suspects followed complainants into Hambledon subdivision west of Walters Road. As complainants attemted to leave subdivision suspects fired multiple rounds at complainants, striking the complainant's vehicle as well as Espinoza who was driving the vehicle. Complainant vehicle came out of subdivision, crossed Walters Road and entered a wooded area on the east side of Walters Road. Suspect vehicle fled scene in unknown direction. Suspect vehicle described as late model GMC Yukon or Chevrolet Tahoe, black in color with possible front end damage.

Anyone with information regarding the whereabouts of this vehicle is asked to call the Harris County Sheriff's Department Homicide Division at 713-967-5810 or 713-221-6000.

> Case under investigation by the Harris County Sheriff's Department Homicide Division at this time.

http://www.hcso.hctx.net/newsdetails.asp?grp=hom&[illegible]27

RESPONDENTS' APPENDIX/EXCERPT 20

[USCA5 1972]

file:[illegible]/News%20Releases/nr010201-2.htm

Houston Police Online

[LOGO] [SEAL] **News Release**
1200 Travis, Houston, Texas 77002
713-308-1800

chief's message

terms of use
news releases
mission statement
hpd divisions

contact hpd
crime stats
hpd heroes
hpd history

a career with hpd
positive interaction
crime prevention

what's new
search
newsletter
links

city of houston
houston weather
houston traffic
houston culture
texas laws
city ordinances

Date: January 2, 2001

Subject: Incident at 5602 Cavalcade

The Houston Police Department is investigating the shooting death of a woman at 5602 Cavalcade about 9:10 a.m. on Tuesday, January 2, 2001.

According to Homicide investigators Sergeants P.C. Motard and D.E. Calhoun, the suspect Richard Mims, (b/m DOB xx-xx-xx) was buying a washateria from the victim, whose name is pending notification of kin. A few years ago, the washateria burned and was remodeled at a cost of about $40,000. Mims and the victim were having problems as to who owed who money for the remodeling. Today the victim and the suspect got into an argument while at the washateria. Mims pulled a handgun and shot the

woman. She died at the scene of a gunshot wound to the chest and right hip. Mims fled the scene and his whereabouts are unknown. Murder charges are pending.

Anyone with information regarding the whereabouts of the suspect should contact the Houston Police Homicide Division at 713-308-3600 or Crime Stoppers at 713-222-TIPS.

srt 1-2-01
Inc#591301

RESPONDENTS' APPENDIX/EXCERPT 21

REPORTER'S RECORD

VOLUME 4 OF 5 VOLUMES

TRIAL COURT CAUSE NO. 2002-09290

CARL R. PRUETT AND NATIONAL AMERICAN INSURANCE COMPANY d/b/a ALLIED BONDING COMPANY	)	IN THE DISTRICT COURT
V.	)	OF HARRIS COUNTY, TEXAS
THE HARRIS COUNTY BAIL BOND BOARD	)	125TH JUDICIAL DISTRICT

****

TEMPORARY INJUNCTION HEARING

****

On the 27th day of March, 2002, the Temporary Injunction Hearing came on to be heard in the presence of the Judge, in the above-entitled and numbered cause; and the following proceedings were had before the Honorable John Coselli, Judge presiding, held in Houston, Harris County, Texas:

Proceedings reported by computerized stenotype machine.

Mary M. Mills, CSR No. 2309
Official Court Reporter, 125th Judicial District Court
301 Fannin, 5th Floor
Houston, Texas 77002
(713) 755-5588

* * *

[41] [USCA5 2161] DEPUTY KIRBY JONES,

was called as a witness, having been first duly sworn, and testified as follows:

DIRECT EXAMINATION

BY MR. FURLOW:

Q. Would you state your name for the record?

A. Kirby L. Jones.

Q. *And by whom are you employed?*

A. *Harris County Sheriff's Department.*

Q. How long have you been employed at the sheriff's [42] [USCA5 2162] department?

A. Twenty-seven-and-a-half years.

Q. What is your current job title?

A. I was working on the street prior to May of last year.

Q. What experience, if any, have you had in the warrants division of the Harris County Sheriff's office?

A. I basically answer the telephones – answer the telephones and when the detectives call in on the radio.

* * *

Q. Would it be correct to say that the warrants division officers, including you will make information available to the public about unexecuted pending arrest warrants?

A. Yes.

Q. And is that information available to anyone who calls up and ask if there is an unexecuted arrest warrant pending for their arrest?

A. Oh, yes.

[43] [USCA5 2163] Q. Is that the policy of the Harris County Sheriff's office?

A. It was.

Q. You said it was. Did that policy at the Harris County Sheriff's Office about public information, did that change recently?

A. *We were told a few months back that that was public information. We had to give them information if they called and check to see if they had warrants on them.*

Q. *Has that policy changed any within, say, the past* week?

A. *Was it when?*

Q. *Within the past week?*

A. Oh, yes.

Q. Would you tell the Judge when that public information policy changed at the Harris County Sheriff's office?

A. At 12:45 yesterday afternoon.

Q. What's the new policy of the Harris County Sheriff's office?

A. We no longer can give out information if people call in to see if they are wanted.

Q. And how did you learn of that new policy?

A. My supervisor informed me of it yesterday.

[44] [USCA5 2164] Q. Did your supervisor tell you it had anything to do with these Bail Bond Board issues?

A. No, he did not.

Q. Let me ask you about unexecuted arrest warrants and public safety issues. Are you aware of any instances where a defendant, against whom criminal charges have been filed, learned of an unexecuted arrest warrant and waited with a gun to kill a Houston Police Department officer or Harris County sheriff's officer?

A. I've arrested a number of people over the 25 years.

Q. Yes, sir?

A. I've never had to go in and had to take a gun from one, although they hide. You are always facing

danger when are you are trying to arrest someone, but if you got a show of force, then that danger kind of cease down a little bit.

Q. *Do you have any reason, as a 27-year veteran of the Harris County Sheriff's Office, to believe that people who find out they have an unexecuted arrest warrant from a bondsman they never heard of are anymore likely to try to hurt a police officer than people who have got an existing business relationship with a bondsman? Do you have any reason to believe that group who hears this information from somebody they don't know* [45] [USCA5 2165] about are *more likely to kill an officer?*

A. Well, you never know what's on a criminal's mind. You never know what's on their mind, especially when they are repeated criminals. Those are the ones that you have to really be careful with. *Twenty-five years of working on the street, I've never had to shoot anybody or physically hurt anybody.* They all are going to hide. They hide from you. They are under the bed, in the closet, wherever.

Q. *In your experience, do you have an opinion as to whether a potential criminal defendant is any more likely to hide if they get word that there is an arrest warrant for them from some third-party bail bondsmen, like Carl Pruitt, as opposed to some people with whom they have an existing bond relationship? Does that make a difference?*

A. *Well, the first offender, it may not. The first offender may not, if he has a bond. But a repeated*

criminal, who has been to TDC two or three times, is going to hide from you. He's not going to make himself easy for you to get your hands on.

Q. *Has it been your experience, then, that the repeat offenders, who have had experience with the criminal justice system, are more likely to flee the jurisdiction than the first-time offender?*

A. *I would say so of the repeated ones, yes.*

* * *

[52] [USCA5 2167] coming?

A. Mainly; they may not be there when I get there.

Q. Or they might hurt you when you get there?

A. I beg your pardon?

Q. That they might hurt you when you get there?

A. I've never looked at it that way. But, like I *say, I always go with a short force. I don't just go there myself and my partner. I've got plenty backup. When you've got plenty backup, then you have no problems.*

* * *

Q. Would you – I guess let me ask it to you directly this way: When you go to arrest someone, and they don't know that that's what you're there for because you're – do you dress in something like you're, wearing right now, or do you wear a uniform?

A. *No, I wear plain clothes, and I have a jacket on and a bulletproof vest that says "Sheriff's department."*

Q. And why is – do all the officer's who execute warrants wear plain clothes?

* * *

RESPONDENTS' APPENDIX/EXCERPT 22

[USCA5 2816]

* * *

[31] GILDA HOLMES,

was called as a witness, having been first duly sworn, and testified as follows:

DIRECT EXAMINATION

BY MR. FURLOW:

Q. Would you state your name for the record?

A. Gilda Holmes.

Q. *And by whom are you employed?*

A. Deputy clerk. I'm employed with the district clerk's office.

Q. That's the Harris County District Clerk's office?

A. *Harris County District Clerk's office.*

Q. What is your job title?

A. I'm a deputy clerk team leader.

Q. How many years have you been employed by the Harris County District Clerk's office?

A. About 21.

Q. What are your current job responsibilities at the Harris County District Clerk's office?

A. We basically help the public. Anyone, comes in [32] [USCA5 2817] that want criminal information, criminal background check, we basically help them. As long as they give us their name, birth date, or social security number, we can provide them with any criminal information.

Q. All right. How – what are your job responsibilities with respect to the Harris County Justice Information Management System, known as JIMS?

A. The JIMS information, we can give them any criminal information that they want, as far as what they was charged with, and the disposition, what they received.

Q. And that information is available to the public alas a whole. Is that correct?

A. Correct, it's criminal information for anyone.

Q. All right. Can a member of the public find out about the existence of an unexecuted arrest warrant by coming in to your office and using your JIMS system?

A. Correct. They can get a deputy clerk to help them, or we also have terminals for the public. They can use the public terminals.

Q. Approximately, how many terminals are there available for the public?

A. We have about four, maybe five.

Q. Is there any charge for the public to use those terminals?

[33] [USCA5 2818] A. No, sir, there's no charge.

Q. Is all of this information about, say, unexecuted arrest warrants available to the public because it's public record information?

A. Yes, sir.

Q. Would that also be true with respect to information about persons placed in Harris County Jail or police detention?

A. Yes.

Q. Does the Harris County District Clerk's office, in fact, sell JIMS public record criminal information to attorneys through your offices?

A. Yes, sir, we do have a JIMS report. It's called the 127. That's everyone that was arrested, say, last night, and it's public information. Anyone can purchase it.

Q. Has it been your experience that you have attorneys coming to your offices on, say, a weekday morning purchasing copies of that JIMS public record criminal justice information?

A. Yes, sir. In fact, we have it – it should be available no later than about 8:15 every morning.

* * *

[36] [USCA5 2820] A. Yes.

Q. And will you give them an answer on the telephone?

A. Yes.

Q. If 48 hours had passed?

A. If 48 hours have passed.

Q. You said that you're providing this information that's on JIMS because it's public information, in your understanding, right?

A. Right.

Q. You're not an attorney, are you?

A. No.

Q. Do you have – so you don't – are you saying – you're not expressing an opinion that under the Texas Open Records Act this is information that must be released to the public. You're saying that your office has a policy of releasing this information?

A. Yes, we do.

* * *

RESPONDENTS' APPENDIX/EXCERPT 23

[USCA5 2238]

Jonathan J. Paull
Attorney at Law
917 Franklin Ste. 250
Houston, Texas 77002

[Postage Stamp]

Daisey Williams Howard
xxx xxx xxx
xxxxx xx xxxxx-xxxx

- Doctorate of Jurispudence
- Licensed to Practice by the Texas Supreme Court
- Licensed to Practice by the United States District Court Southern District
- Licensed to Practice by United States Court of Appeals for the 5th Circuit
- Houston Bar Association
- Houston Young Lawyers Association
- Harris County Criminal Lawyers Association
- National Association of Criminal Defense Attorneys
- Member National College for D.U.I. Defense

ADVERTISEMENT

[USCA5 2239]

JONATHAN J. PAULL
Attorney at Law
The Commercial Bank Building
917 Franklin, Suite 250
Houston, Texas 77002
URL: WWW.LAWYERS.COM/JJPAULL
(713) 227-1525 (713) 227-5840 (fax)
(713) 913-0685 24 hr pager

LET ME HELP YOU OUT OF THIS DIFFICULT SITUATION. Harris County Public Court Records indicate that you have been charged with a crime. You need an *EXPERIENCED CRIMINAL TRIAL ATTORNEY*. There are a lot of Attornys who send lettets however there are very few experienced trial attorneys. One must consider experience, reputation, and results when selecting an attorney. *I have trial experience in both State and Federal Courts.* Here are just some of my results:

Case	Charge	Outcome
STATE vs. ALSAY	Sexual Assault	DISMISSED
STATE vs. CLARK	Felony of Possession of Marijuana	Motion to Suppress Evidence, GRANTED
STATE vs. EDO	Indecency with a Child	DISMISSED by the Grand Jury
STATE vs. GOOD	DWLS	NOT GUILTY
STATE vs. HOLLINS	Felony Theft	DISMISSED, day of trial

STATE vs. KELLEY	Unauthorized Use of Motor Vehicle	DISMISSED, day of trial
STATE vs. JUDKINS	Theft of a Firearm	DISMISSED, by the Grand Jury
STATE vs. MANUEL	Indecent Exposure	NOT GUILTY
STATE vs. MARTINEZ	Sexual Assault of a Child	DISMISSED by the Grand Jury
STATE vs. POWELL	Aggravated Sexual Assault of a Child	DISMISSED by the Grand Jury
STATE vs. PRYSUSKA	DWI.17	NOT GUILTY
STATE vs. RAMIREZ	DWI.18	DISMISSED, day of trial
STATE vs. RODRIGUEZ	Possession of controlled substance	Motion to Suppress Statements, GRANTED
STATE vs. GARCIA	Aggravated Sexual Assault of a Child	DISMISSED by the Grand Jury
STATE vs. YUMMIT	Felony of Possession of Marijuana	Motion to Suppress Evidence, GRANTED
STATE vs. WHITE	Endangering a Child	DISMISSED by the Grand Jury

(ALL CASES ARE DIFFERENT, PAST PERFORMANCE IS NO GUARANTEE OF FUTURE RESULTS).

When I represent a defendant I have a special responsibility not to just that defendant but his family, that is why I have a team of private investigators,

toxicologist, expert psychologist and doctors I consult with in order to get the best possible results for my clients. It is important that an attorney is prepared to best represent his client. Do you really think that an attorney who only charges 100.00 will provide quality representation to clients? When hiring an attorney ask the following:

1. How many Jury Trials have you had as a Defense Attorney in the last year?
2. How many motions and hearings have you argued?
3. Who is the investigator or expert you consult for your clients?

You will probably receive letters from other attorneys. Before you decide who will represent you, keep in mind that you need an attorney who understands and responds to your needs; that is why *I maintain a 24-hour pager (713-913-0685) so I am never out of touch with my clients.* Remember there is a difference between those lawyers who will only charge $100.00 and those who will *REALLY* fight for you. My goal is that you keep or regain your freedom.

Sincerely,

Jonathan J. Paull
Attorney at Law

Doctorate of Jurisprudence;
Licensed to Practice by the Texas Supreme Court;
Licensed to Practice by the United States
District Court-Southern District
Houston Bar Association; Harris County Criminal

Lawyers Association; Texas Criminal Defense Lawyers Association National Association of Criminal Defense Lawyers; National College for DUI Defense – Member

ADVERTISEMENT
NOT CERTIFIED BY THE
TEXAS BOARD OF LEGAL SPECIALIZATION

RESPONDENTS' APPENDIX/EXCERPT 24

[USCA5 2471]

[SEAL]

STATE OF TEXAS
OFFICE OF THE GOVERNOR
AUSTIN, TEXAS 78711
[Address And Telephone Number Omitted In Printing]

ANN W. RICHARDS
GOVERNOR

SEP 15 1993

Honorable Bob Lanier
Mayor
City of Houston
Post Office Box 1562
Houston, Texas 77251

RE: APPLICANT: City of Houston
TITLE: Gulf Coast Violent Offenders Task Force
AMOUNT: $ 753,759

Dear Mayor Lanier:

It is my pleasure to inform you that the above grant has been approved in the amount indicated. Your assistance in helping us fulfill our mission to enhance public safety is appreciated.

This grant award must be accepted within forty-five (45) days of the award date by the execution and return of the enclosed grantee acceptance notice in the pre-addressed envelope provided. A copy of the CJD "Grant Application and Administration Guidelines" is being sent separately to the financial officer designated in your grant application.

If there are questions pertaining to the administration of this grant, please call our office at 512/463-1919. We look forward to working with you to ensure the success of your program.

Sincerely,

/s/ Ann Richards
ANN W. RICHARDS
Governor

cc: Mr. H. A. Conteras
Mr. George Greanias

[USCA5 2473]

ANN W. RICHARDS
Governor
State of Texas

[SEAL]

DOYNE BAILE
Director
Criminal Justice
Division

[Address And Phone Number Omitted In Printing]

STATEMENT OF GRANT AWARD

GRANT NUMBER: SF-94-S05-06834
GRANT PERIOD: 10/01/93-09/30/94
YEARS FUNDED: 1
GRANTEE: City of Houston
TITLE: Gulf Coast Violent Offenders Task Force

PROGRAM FUND: CRIMINAL JUSTICE PLANNING FUND

AWARD AMOUNT – STATE:	$	753,759
FEDERAL:	$	0
GRANTEE MATCH – CASH:	$	231,959
TOTAL AMOUNT:	$	753,759
TOTAL MATCH:	$	231,959
TOTAL PROJECT COST:	$	985,718

The approved budget is reflected in the attached Grant Application Digest. This grant is subject to and conditioned upon acceptance of the CJD Grant Application and Administration Guidelines (GAAG) promulgated for this specific program fund (referenced above) through the Office of the Governor, Criminal Justice Division. Applicable special conditions are contained in GAAG or cited below. Total project costs must be accounted for in accordance with the Uniform Grant and Contract Management Standards (UGCMS) and the program fund guides.

GRANTEE REQUEST FOR FUNDS

Grantee may request funds on a monthly basis for awards greater than $10,000 and on a quarterly basis for awards of $10,000 or less. Copies of invoices should be submitted with requests for funds for equipment purchases and construction, if applicable to this program fund.

FUTURE FUNDING

Approval of the above-referenced grant does not commit the Governor's Office to future funding. Any

such funding shall be determined by the state plan or guide under which application may be made, by all applicable policies and procedures promulgated by the Governor's Office, Criminal Justice Division, and/or federal guidelines, and by the appropriation of funds.

GRANT ADJUSTMENTS

Grantee shall submit written requests for grant adjustments, as required by the applicable Criminal Justice Rule contained in the Grant Application and Administration Guidelines for this specific program fund.

SPECIAL CONDITIONS/REQUIREMENTS:

1. Confidential Funds
2. Equipment Review & Approval
3. Americans with Disabilities Act (Attached)
4. Prior to release of funds, the City of Houston must provide a resolution from it's governing body.
5. Interagency Agreement Review and Approval

SEP 15 1993 — AWARD DATE

/s/ Ann Richards
ANN W. RICHARDS
GOVERNOR

[USCA5 2474]

Date: 09/10/93
Time: 10:13:11

OFFICE OF THE GOVERNOR
CRIMINAL JUSTICE DIVISION

DIGEST OF GRANT APPLICATION

GRANT NUMBER:
SF-94-S05-06834

REGION NUMBER: 1600

APPLICANT:
City of Houston

TITLE: Gulf Coast Violent Offenders Task Force

YEAR OP FUNDING: 1

PROGRAM FUND:
CRIMINAL JUSTICE PLANNING FUND

GRANT PERIOD:
10/01/93 through
09/30/94

AMOUNT RECOMMENDED		AMOUNT REQUESTED
State: $ 753,759	Federal: $0	$760,334

DESCRIPTION:

This project will provide funding to the City of Houston to implement the Gulf Coast Violent Offender Task Force. This task force is a multi-agency initiative designed to investigate, locate, and apprehend potentially violent suspects wanted in connection with active felony or parole violation warrants.

The primary objective is to reduce the number of wanted persons associated with crimes of violence, narcotics, and firearms currently at-large in the region. The strategy developed to achieve the objectives is the formation of a specially trained unit involving personnel and resources from the Houston Police Department, the Harris County Sheriffs' Department, and other local law enforcement agencies. By combining the various individual efforts into one regional tank force, greater efficiency and effectiveness can be achieved.

		CJD/FED FUNDS	CASH MATCH	TOTAL PROJECT
A.	PERSONNEL	$ 207,964	$ 49,646	$ 257,610
B.	PROF & CONTR	477,147	105,801	582,948
C.	TRAVEL	5,670	0	5,670
D.	EQUIPMENET	27,932	27,932	55,864
E.	CONSTRUCTION	0	0	0
F.	SUPPL & DOE	35,046	48,580	83,626
G.	INDIRECT COST	0	0	0
	TOTAL	$ 753,759	$ 231,959	$ 985,718

BUDGET DETAIL:

A. One HPD sergeant (match) $39,356; four HPD police officers $130,499; and one HPD admin. assistant $32,000; plus fringe benefits of $55,755.

B. Contractual arrangement with Harris County for the following: Personnel – one sergeant $39,588, seven detectives (two are match) $277,116, one clerk [USCA5 2475] $24,852, plus fringe benefits

$116,687. In addition, there are contractual arrangements with Galveston County for one deputy ($28,572 salary plus $9,277 fringe benefits), with the city of Humble for one police officer ($32,868 salary plus $11,957 fringe benefits), and with the city of Baytown for one police officer ($29,000 salary plus $13,031 fringe benefits).

C. In-state travel to apprehend fugitives $5,670.

D. Four computers (HPD) @ $3,525 ea., $14,100; two printers (HPD) @ $1,410 ea., $2,820; two ASP switches (HPD) @ $372 ea., $744; 12 mobile phones (HPD) @ $200 ea., $2,400; 14 portable radios (HCSO) @ $2,200 ea., $30,800; one charger (HCSO) $1,000; and one printer/JIMS (HCSO) $4,000.

F. Office supplies $6,496; mobile telephone expense $21,600; confidential funds $5,000; vehicle maintenance expenses (HPD-match) $27,000; rechargeable batteries $1,400; whisper mikes $4,550; miscellaneous supplies $2,400; and vehicle maintenance costs (HCSO-match) $15,180.

[USCA5 2478]

GULF COAST VIOLENT OFFENDERS TASK FORCE
YEAR FIVE
October 1, 2003
through
September 30, 2004

WARRANTS CLEARED	2003 1ST	2004 2ND	2004 3RD	2004 4TH	6TH YR TOTAL	7TH YR TOTAL	8TH YR TOTAL	9TH YR TOTAL	10TH Y TOTAL	GRAND TOTAL
MURDER	8	8	0	0	16					122
SOLICITATION TO COMMIT MURD	0	0	0	0	0					0
MANSLAUGHTER	0	0	0	0	0					26
ATTEMPTED MURDER	3	1	0	0	4					26
AGG ASSAULT	37	22	0	0	59					772
IND. WITH A CHILD	0	0	0	0	0					3
SEX. ASS/ITC	18	23	0	0	41					675
SEX ASST	11	12	0	0	23					433
AGG KID	0	0	0	0	0					26
KID	2	1	0	0	3					21
ROBBERY	12	15	0	0	27					498
DRUGS	29	26	0	0	55					769
OTHER	106	87	0	0	193					2187
STATE PAROLE VIOLATORS	33	23	0	0	56					1238
FEDERAL PAROLE VIOLATORS	0	0	0	0	0					95
FEDERAL WARRANTS	77	56	0	0	133					1305
TOTAL WARRANTS CLEARED	336	274	0	0	610	0	0	0	0	8196
TOTAL PERSONS ARRESTED	275	212	0	0	487					6735

Month of Task Force Existence	65	
Average Warrants Cleared Per Month		126.09231
Average Arrested Persons Per Month		103.61538

Total Warrants Cleared Grant/Task Force	17,522
Total Arrested by Grant/Task Force	14,541
STATE PAROLE VIOLATORS	2,620
FEDERAL WARRANTS	2,316

RESPONDENTS' APPENDIX/EXCERPT 25

[USCA5 2884]

Affidavit

State of Texas
County of Harris

Before me, the undersigned authority appeared Diane Strouse, known by me, who did state as follows after being duly sworn and placed under oath:

"My name is Diane Strouse, TDL/ID # xxxxxxxx and my business address is 17649 Stuebner-Airline, Spring, Texas, 77379. I was contacted by a representative of allied bonding Agency on June 5, 2002 at approximately 8:15 a.m. and informed that charges had been filed on a relative of mine, Christopher Habel, in Cause No. 1119270, and that his bond had been set at $500 so that the process of obtaining his release could begin. I did not use the services of Allied Bonding Agency and posted a cash bond instead, but I did appreciate receiving the information from Allied as it was very beneficial to me in this regards. I did not consider the phone call to be harassment in any way, but found the caller to be most informative and most helpful.

Additional comments: I felt no pressure to work with Allied, they were very helpful and if I ever need their service (God Forbid!) I will call them, I will carry their card in my file. [/s/ ds]

All of the above statements are true, correct, and within my personal knowledge.

/s/ Diane Strouse
Diane Strouse

Sworn to and subscribed before me this the 6th day of June, 2002.

/s/ D.G. Tooley
Notary Public for the
State of Texas

[SEAL] D. G TOOLEY
MY COMMISSION EXPIRES
May 20, 2005

[USCA5 2884]

AFFIDAVIT

STATE OF TEXAS
COUNTY OF HARRIS

BEFORE ME, the undersigned authority did appear the below named persons who did state the following after being duly sworn and placed under oath:

"My name is Lowel Mariano, TDL/TID # xxxxxxxx, SSN: xxx-xx-xxxx I am the person who paid the bail bond fee for Angela Martinez Cause # 1118308, on this date. I was initially contacted by a representative of ALLIED BONDING AGENCY at 217 p.m. on this date and informed that said party was incarcerated, that charges had been filed, and that the bonding process could be initiated at that time to secure their release from jail. I did not consider this call to be

harassment in any way, but instead was very informative, most helpful and very beneficial. I did appreciate receiving this information from ALLIED as it made the process of securing the release of the defendant smoother, faster, and as efficient as possible, even though I was not too pleased to discover that they were in jail.

Additional comments: They contacted me as a courtesy call for my situation and helped me out Thanks!!!

All of the above statements are true, correct, and within my personal knowledge.

Signed this the 30 day of May, 2002.

/s/ Lowel Mariano
Affiant

Sworn to and subscribed before me this the 30th day of May, 2002.

/s/ Pearl Veles
NOTARY PUBLIC FOR THE
STATE OF TEXAS

[SEAL] Pearl Ann Veles
My Commission Expires
February 28, 2004

RESPONDENTS' APPENDIX/EXCERPT 26
[USCA5 3241]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CARL R. PRUETT AND SCOTT MARTIN, Plaintiffs,	)	
VS.	)	C.A. No. H-03-3241
THE HARRIS COUNTY BAIL BOND BOARD and HARRIS COUNTY, Defendants.	)	

****

ORAL DEPOSITION OF
BRUCE DOUGLAS CARR
JULY 22, 2004
VOLUME 1

****

ORAL DEPOSITION of BRUCE DOUGLAS CARR was taken in the above-styled and numbered cause on the 22nd day of July, 2004, from 9:27 a.m. to 11:01 a.m., before **Patricia A. Watson, CSR, RPR, CRR**, in and for the State of Texas, reported by machine shorthand method, at the Harris County Attorney's Office, 1019 Congress, 15th Floor, Houston, Texas, pursuant to the Federal Rules of Civil Procedure.

* * *

[5] [USCA5 3243] **BRUCE DOUGLAS CARR,**

having been first duly sworn, testified as follows:

EXAMINATION

BY MR. FURLOW:

Q. Would you state your name for the record?

A. Bruce Douglas Carr.

* * *

[16] [USCA5 3250] Q. Okay. Did you ever offer any testimony to the Texas Legislature in connection with the amendments to the bail bondsmen portion of the Texas Occupations Code – that is, Chapter 1704 to the Texas Occupations Code – in the year 2003?

A. Just a second. I want to say I did offer testimony relating to a number of items that were out there related to various things, nothing specifically to solicitation that I recall at all.

* * *

[32] [USCA5 3259] Q. Okay. Specifically, if an incident occurred in 1988 in which some person, whether a bondsman or someone else, tipped off the defendant that's the subject of the Radney affidavit about an arrest warrant, that would have occurred long before the Justice Information Management System was modified to put in a 48-hour window; isn't that correct?

A. Correct.

Q. Okay. So now as opposed to 1988, a person whose arrest warrant information appeared on Harris County's Justice Information Management System would – and under those circumstances a police officer would have at least 48 hours' time to serve that arrest warrant before that information became available for bondsmen's use, correct?

A. With the change in place now?

Q. Yes, sir.

A. Yes.

Q. Okay. Now, what are – aside from bondsmen, how – what are the other means by which defendants can become aware that a police officer has an arrest warrant [33] [USCA5 3260] that he might attempt to serve upon him?

A. I'm assuming here at the district clerk's office they could run the information once it becomes available.

Q. Okay. So Item 1, we have the district clerk's office can provide a member of the public with that information that he is the subject of an existing arrest warrant, correct?

A. There's a possibility, yes.

Q. Okay. And second, an attorney accessing the Justice Information Management System could learn, in fact, that there is an arrest warrant for Defendant X that has not been served, correct?

A. Correct.

Q. And that defendant [sic] could, to the best of your knowledge, pass on that information to that defendant, enabling that defendant to flee the jurisdiction or destroy evidence or voluntarily turn himself in, correct?

A. I believe I answered that earlier, yes.

Q. Okay. And in addition to those, a member of the press could, in fact, utilize the Justice Information Management System and call up, let us say, some fairly well-known defendant and say, "Rudy Tomjanovich, did you know that they've issued an arrest [34] [USCA5 3261] warrant for you?" That could happen, too, couldn't it?

A. That's correct.

Q. In addition, if a police officer went out and attempted to serve an arrest warrant on the defendant who wasn't at home, other members of that family – of that defendant's family who were there present at the attempted service, they would then know that there is an arrest warrant out there and that the officer is attempting to serve the defendant who was not present, correct?

A. Correct.

Q. Isn't it also true that when sheriff's officers are attempting to serve an arrest warrant, they would sometimes ask neighbors or other persons

information about the whereabouts of the defendant if he can't be found, let us say, at home or at work?

A. Correct.

Q. So under those circumstances, a defendant could learn of the existence of an arrest warrant and the fact the sheriff's department is trying to serve them from other people who witnessed the service attempts of the sheriff's department, correct?

A. Correct.

Q. Does that happen, to your knowledge, rarely or frequently?

[35] [USCA5 3262] A. Which part?

Q. The instance in which a defendant is made aware not through a bondsman, not through an attorney, but through other persons of the fact that the sheriff's department is actually looking for him and trying to get him served with an arrest warrant.

A. I don't know. I would assume as an officer doing that job myself, if I ask you if you know this individual; then, yes, I believe I've blown my element of surprise; but I realize that you have the possibility to contact this person and let them know.

Q. And that's just part of the law enforcement officer's job. He knows that if he, in fact, inquires about members of the public, he may sometimes get cooperation and he may sometimes inadvertently enable them to tip off a defendant about the existence of an arrest warrant, correct?

A. Correct.

Q. I'm going to show you what's marked as Exhibit 12, which is the affidavit of Gregg Wilbanks yellow highlighted to draw attention to a 1999 incident that he referred to in that affidavit. And let me tell you, I'm asking this question so I don't have to take that man's deposition.

If there was an incident in 1999 where a [36] [USCA5 3263] bondsman or some other person tipped off a defendant about the existence of an arrest warrant, that would have occurred before the JIMS system was modified to give officers a 48-hour blackout period, correct?

A. Correct.

Q. I'm going to move towards the wrap-up phase of this deposition. I'm going to show you what's marked as Exhibit 6, which is some testimony of Officer Bill Harwell from the temporary injunction hearing case. You work with Officer Harwell from time to time in the sheriff's department, do you not?

A. Yes.

Q. Okay. And you respect Officer Harwell as a seasoned law enforcement officer; is that correct?

A. Correct.

Q. Okay. And you recall that the Harris County Bail Bond Board called him as a witness to offer certain opinions in the temporary injunction hearing

concerning the constitutionality of Local Rules 24 and 25, correct?

A. I'm not sure what the witness list was.

Q. Okay. Let me just ask you to look at a couple of particular things. Specifically, on Exhibit 6, Pages – Page 64, Lines 13 to 23, Officer Harwell testified about some letters from bondsmen and attorneys. Would you look at that testimony?

[37] [USCA5 3264] A. Okay.

Q. Okay. Would you agree with me that a rule preventing bondsmen from sending out notice letters notifying defendants of arrest warrants is not going to be an effective means of guaranteeing that police officers have the element of surprise if the same defendants can and do receive notice letters from attorneys about the same offense? Would you agree with that?

A. The solicitation of the letters takes – it's a longer process. That refers to, looked like, two attorneys. And as far as the solicitation goes, it shouldn't be done just like the phone calls; but it's specific to an addressee.

Q. Okay.

A. Not just to anybody.

Q. But specifically, to go back to the question, would you agree that if Defendant X picks up an arrest warrant after being charged with an offense and that Defendant X then receives two days, three

days later letters from attorneys as well as bondsmen who use the information on the Justice Information Management System and each solicit the bonding work and the criminal defense work of that defendant charged with the crime, wouldn't you agree that just eliminating the bondsman [38] [USCA5 3265] letters or phone calls is not going to eliminate the threat, if it exists, that a police officer serving a warrant will find a defendant ready to ambush him or ready to flee or ready to destroy evidence? Would you agree with that?

A. A notice is notice, regardless of, I think, the form that it comes in.

Q. All right. And would you, therefore, have the opinion that a rule that really worked effectively to maximize protection for police officers would simultaneously prohibit not just bondsmen, but also attorneys, the press, and anyone else from communicating the existence of an unserved arrest warrant to a defendant at any time prior to the service of the arrest warrant on that defendant?

A. I would like to see that happen. I'd like it to limit everybody.

Q. All right. I'm going to show you what's marked as Exhibit 7, which is one of the notice letters that your fellow officers in the warrant division of the Harris County Sheriff's Department send out to defendants in Harris County, Texas. Have you seen letters of this sort before?

A. Yes, this one here.

* * *

[41] [USCA5 3266]

* * *

Q. Do you know how many cleanup letters the sheriff's department sends out on a yearly basis to notify people about unserved arrest warrants?

A. I have no idea.

Q. Do you know how many letters, if any, the Houston Police Department sends out to defendants who have been accused of a crime on an annual basis?

A. I'm not aware that they did.

Q. Okay. Do you know whether the persons who work in the warrants division and send out notice letters such as the one we just took a look at, whether those people sending out the notice letters are actually the officers who investigated the allegedly criminal offense?

A. Oh, I have no idea.

Q. Let me just go through a few follow-up things. I just want to make sure this. You're not aware of any specific incident where you can say that a bail bondsman like Carl Pruett who sends out a notice [42] [USCA5 3267] letter or makes a telephone call to a defendant with an unserved arrest warrant,

you're not aware of any instance where such a call by such a bondsman who has no existing bail bond relationship with that defendant, you don't know of any instance where that has resulted in the death or injury of any police officer here in Harris County or anywhere in the country; is that correct?

A. That's correct.

Q. Okay. And you don't know of any specific incident either here in Harris County or anywhere in the country where a letter by a bondsman, third-party bail bondsman like Carl Pruett or a phone call by a third-party bail bondsman like Carl Pruett to a defendant with an unserved arrest warrant has actually resulted in the destruction of evidence, do you?

A. This particular narcotics case that was part of the suspension, I don't know. You'd have to get with the detectives. But I think that was part of the case, that the evidence was lost or some of the evidence was lost.

Q. Now, let's talk about this for a moment. I just want to clear this up. You don't have any personal knowledge that in the Jerry Smith case, which is the subject of our Exhibit 10, that there was any particular evidence of possession of a controlled substance that [43] [USCA5 3268] was physically damaged by Smith or by any other person. You don't have any personal knowledge of that, correct?

A. Correct.

Q. And you haven't seen or read any offense report that tells you that there was evidence in Jerry Smith's possession or some third party's possession that Smith or some third party destroyed between the time that an arrest warrant was issued for him and the time he was arrested. You don't – haven't seen anything to suggest that, have you?

A. No, I have not.

Q. Okay. Now, the very fact that Defendant Smith, Jerry Leroy Smith, would be charged with possession of a – with actual manufacture and delivery of a controlled substance, do you have an understanding of what the facts were that led to him being charged with that offense?

A. No, I do not.

* * *

[46] [USCA5 3269] Q. All right. A few follow-up questions on other things we've gone over on previous occasions in the past. There are no surveys or polls or other data, compilations that you're aware of in which anybody here in Harris County has actually given citizens an opportunity to say whether they would find a bondsman's [47] [USCA5 3270] call notifying them of an arrest warrant or the jailing of a relative offensive as opposed to informative and useful? No

such documents, surveys, polls exist to the best of your knowledge, correct?

A. Correct.

Q. Aside from what Defective Daniels may have told you about potential loss of some evidence that you're not certain of with respect to this Exhibit 10 matter involving Jerry Smith, you're not aware of any instance where a bondsman's telephone call to a potential – to a defendant with an unserved arrest warrant has actually resulted in –

MR. NACHTIGALL: Asked and answered several times.

MR. FURLOW: No, slightly different.

Q. (BY MR. FURLOW) – has actually resulted in a defendant fleeing the jurisdiction or fleeing the police officers, are you?

A. No.

MR. FURLOW: See, it was flight, not that.

* * *

RESPONDENTS' APPENDIX/EXCERPT 27

[USCA5 3282]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CARL R. PRUETT AND SCOTT MARTIN	)	CIVIL ACTION
VS.	)	NO. H-03-3241
THE HARRIS COUNTY BAIL BOND BOARD AND HARRIS COUNTY	)	

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DEPOSITION OF

KATHY BRADDOCK

JUNE 28, 2004

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* * *

[4] [USCA5 3284] KATHY BRADDOCK,

having been first duly sworn, testified as follows:

EXAMINATION

BY MR. FURLOW:

Q. Ms. Braddock, would you state your name for the record.

A. Kathleen Braddock.

Q. By whom are you employed?

A. Harris County District Attorney.

Q. In what capacity?

A. I'm assistant district attorney. Currently the chief of the Bond Forfeiture Division.

Q. For how many years have you been employed by the Harris County District Attorney's office?

A. Since 1985.

Q. For how many years have you been the person in charge of the Bond Forfeiture Department?

A. Since 1992.

* * *

[30] [USCA5 3303] Q. Do you understand that the source of the information that many of the attorneys access in terms of notifying defendants of the existence of unserved arrest warrants, that the source is, in fact, the Justice Information Management System?

A. Yes.

Q. And how is it that criminal defense attorneys in [31] [USCA5 3304] Harris County are able to access the Justice Information Management System to obtain the information that a defendant has an open, unserved warrant issued in his name, that the defendant is liable for arrest at any time?

A. I imagine the same way that the bail bondsman do, through the public – they're public subscribers to JIMS.

Q. Aside from having a paid public subscription to JIMS, what other means can Harris County criminal defense attorneys use to obtain information from Harris County employees that an arrest warrant has been issued for a particular defendant?

A. They can wait in line for the public computers in the District Clerk's office that access JIMS.

Q. Are there any other methods?

A. Not unless they are representing a client and the DA has said they are going to re-indict the case and the DA calls the attorney to tell him he's re-indicted.

Q. With respect to the public computers that the JIMS information and that are available in the clerk's office, are those computers only available in the clerk's office downtown?

A. I don't know.

Q. Do you know, in fact, how many JIMS computers are in existence throughout Harris County that criminal defense attorneys can utilize to determine whether an unserved [32] [USCA5 3305] warrant has been issued in any particular defendant's name?

A. I don't know.

Q. Are there any means through which members of the public can call the Harris County Sheriff's Department and learn whether there has been, in fact, a warrant issued for their arrest?

A. I don't know.

Q. Are there any means by which members of the public can access a Harris County Website and find out whether any given member of the public has been arrested and jailed within the past 24 hours?

A. I don't know.

* * *

[43] [USCA5 3314] Q. Same question but with respect to information obtained from an attorney. Let us say – are you aware of any instance where anybody in Harris County has attempted to determine whether communication of truthful information by an attorney about an unserved arrest warrant to the defendant named on that arrest warrant actually resulted in the destruction of evidence?

A. Not that I recall.

Q. Are you aware of any instance where any member of Harris County law enforcement has determined that there is good reason to believe that an attorney's communication of truthful information about an unserved arrest warrant to a defendant named on that arrest warrant resulted in harm or retaliation to any witness or victim of a crime?

A. No.

Q. Are you aware of any instance in which an attorney's communication of information about an unserved arrest warrant to the defendant named on that arrest warrant resulted in harm to any police officer or law enforcement agent?

A. No.

Q. You're aware that the Houston Police Department sends out notice letters to defendants charged with various [44] [USCA5 3315] offenses, giving those defendants an opportunity to arrange for a bondsman or an attorney to put up a bond and to make an appearance for them?

A. My understanding is that after they have screened them, they typed the case, they send them out.

Q. Have you talked to any Houston Police Department officers about the screening process used by the Houston Police Department, not Harris County Sheriff's Office, with respect to notice letters and screening that occur?

A. No.

Q. Do you recognize the potential, if any, that a Houston Police Department letter to a defendant with an unserved arrest warrant could result in that defendant laying in wait and ambushing the police officer attempting – a later police officer attempting to serve a warrant?

A. Yes.

Q. That's always a potential danger whenever any law enforcement agent is serving an arrest warrant, isn't it?

A. Absolutely.

Q. And that danger also exists any time that an attorney notifies a defendant of an unserved arrest warrant?

A. That's correct.

Q. Are there any studies or analyses of which you are aware that say how much danger is posed to law enforcement [45] [USCA5 3316] officers by communications from those law enforcement officers – fellow officers in sending out notice letters advising defendants of the existence of unserved arrest warrants?

A. No.

Q. Are you aware of any studies or analyses that show how much danger exists because attorneys communicate truthful information to defendants about unserved arrest warrants naming those defendants as the defendant – are there any studies or analyses that reflects how much of a danger exists from that communication of information?

A. No, not that I know of.

Q. Are there any studies or analyses that reflect how much danger exists for police officers, with respect to law enforcement safety, in serving arrest

warrants as a result of bondsmen solicitation of business concerning unserved arrest warrants?

A. Not that I know of.

Q. So you don't know of any information that I should look into that would reflect that bondsmen solicitation increases the danger of injury or death to police officers by any percentage amount?

A. No.

Q. The same with attorneys?

A. No.

[46] [USCA5 3317] Q. The same with respect to the notice letters that are sent out by the Houston Police Department or Harris County Sheriff's Office?

A. No.

Q. If we were actually looking at what dangers the Texas Occupation Code solicitation restrictions on bondsmen alleviate or reduce, we wouldn't be able to come up and say that those statutory restrictions reduce the amount of danger to a police officer by any percentage amount?

A. Not that I know of. I don't know if the legislatures had any of that before them or not.

Q. Did you present any testimony to the Texas legislature with respect to the need for the solicitation restrictions that are now found in –

A. No. In the local -- not in the Occupations Code, no.

Q. Do you know of anybody from Harris County, Texas who made a presentation to the Texas legislature at any point in 2003 asking for the legislature to adopt new restrictions on bail bondsmen solicitation of open warrant business?

A. I don't know.

Q. Do you know of anybody from Harris County who asked the legislature or attempted to persuade the legislature to adopt new rules restricting the hours during [47] [USCA5 3318] which bondsmen could communicate with members of the public about bail bonds?

A. I don't know.

Q. There are a number of situations in which no bond is available for a defendant accused of particular offenses in Harris County. Is that correct?

A. Yes.

Q. You routinely oversee those decisions about what type of cases are, in fact, properly considered no-bond cases.

A. When I worked intake, yes.

Q. And what are the categories that are deemed to be no-bond cases that you've handled in intake here in Harris County, Texas?

A. Capital murders are no bonds, habitual offenders are no bonds, an offender who is on probation or parole and picks up another offense is no bond, an offender who is deferred adjudication and picks up a new offense is no bond, a defendant who is out on bond and commits another offenses is no bond, and a defendant whom the DA has reason to believe is a continuing threat to the victim in the case is a no bond at time of filing.

Q. Let me understand this correctly. Does a Harris County assistant district attorney then have an opportunity to go to a magistrate at the time that arrest warrant is [48] [USCA5 3319] being issued, present evidence that a particular defendant poses a continuing threat to the victim or to a witness in that particular case and, therefore, obtain a no-bond status for that particular defendant?

A. There is a mechanism where it is mandatory under some law and it's up to the victim in some cases for the victim to seek a motion and order for emergency protection. And if that is done, then the assistant asks for a no-bond when the arrest warrant is issued.

Q. Have you been present when assistant district attorneys in Harris County have actually obtained no-bone status for defendants who posed a threat to the victim or to a witness?

A. Yes.

Q. Has that occurred on rare occasions or on more than 10 occasions over the past, let's say, year 2004?

A. More than 10.

Q. Where there statistics kept by Harris County with respect to how many of those, shall we say, continuing-threat-to-victim cases, in fact, result in the issuance of no-bond status for defendants?

A. I don't know for certain.

* * *

[51] [USCA5 3321] Q. Do you know of any instance where any law enforcement agency has asked the Harris County District Clerk's office to refrain front listing arrest warrant in no-bond cases on the public record JIMS subscription?

A. No.

Q. Would you agree that a request that the District Clerk's office eliminate display of arrest warrants in no-bond cases would be a means across the board of preventing danger to police officers in those type of cases?

MR. NACHTIGALL: I didn't –

A. Yeah. Could you reask that question? If they eliminated no bond from the public information screen, would it help police officer's safety?

Q. Let me see if I can rephrase that using the English language.

Would you agree that one means of protecting police officers from the danger of ambush in connection with the issuance of arrest warrants in no-bond cases, where no [52] [USCA5 3322] bond is available, would be for the District Clerk to rework the JIM System so that information about no-bond cases – information about no-bond arrest warrant simply does not appear on JIMS?

A. Sure.

Q. Has anybody in Harris County law enforcement, in your experience and knowledge, ever made such a request that Mr. Bacarisse revise the JIM System to eliminate display of no-bond arrest warrant information?

A. I don't know.

Q. Do you know of any particular occasion on which any member of Harris County law enforcement asked Charles Bacarisse to revise the Justice Information Management System to extend the 48-hour moratorium on display of unserved arrest warrant information to 72 hours, 96 hours or any other extended period?

A. I know the District Attorney's office asked that it be blocked until the warrants are executed.

Q. When did that occur?

A. Before the 48-hour block was on there.

Q. What was the result of that request?

A. The 48-hour block, I believe.

Q. Do you recall in what year the 48-hour block went into effect?

A. No.

[53] [USCA5 3323] Q. Since the 48-hour moratorium has existed on JIMS, has the Harris County District Attorney's office ever requested that the District Clerk's office extend that 48-hour moratorium to 72 hours to enable Sheriff's Department officers and other police officers to serve more arrest warrants before the information becomes public?

A. I think that we've requested longer time periods, but I don't know that we've ever just said 72 hours.

Q. What longer time periods did the District Attorney's office request?

A. I think that we wanted unexecuted warrants blocked.

* * *

[55] [USCA5 3324] Since that time, since February 14th, 2001, has the Harris County District Clerk's office ever refused a Harris County district attorney's office's request that the 48-hour moratorium on disclosure through JIMS of public information regarding arrest warrants, has the District Clerk's office ever refused to extend that to, say, 72 hours or 96 hours?

A. No, I don't think we've re-asked after they said no. Just did the 48 hours before.

Q. Were you ever given a reason why the District Clerk's office refused to extend the moratorium on unserved arrest warrant information?

A. No.

Q. So at this point in time you know of no reason that the District Attorney's office could not have in the past two years simply requested that the 48-hour JIMS moratorium on display of arrest warrant information – could have been extended to 72 hours or 96 hours?

A. Because the same people are there. The same JIMS people are there and they said no. Same people in the District Clerk's office. The issue has been re-addressed.

* * *

[58] [USCA5 3327] Would you agree that if the Harris County Sheriff's Department or the Houston Police Department issued press releases to notify members of the public about the existence of –

A. A wanted person.

Q. – a wanted person, that would tend to tip off those defendants who are named as suspects in the press releases?

A. Sure.

Q. Do you as a member of Harris County law enforcement know that, in fact, the Houston Police Department and Harris County Sheriff's Department do, in fact, issue press releases for known and wanted suspects who are the subject of unserved arrest warrants?

A. I don't know if they issue press releases. I know that the press carries stories on wanted individuals.

Q. Have you ever, in the course of formulating your expert opinions about law enforcement safety, reviewed the public WEB pages of the Houston Police Department and Harris County Sheriff's Department with respect to press releases?

A. No.

(Braddock Exhibit Nos. 7 & 8 marked.)

[59] [USCA5 3328] Q. Let me show you what is marked as Braddock Exhibit 7. This is that notice letter from the Harris County Sheriff's Department to Jonathan Klemm that you have looked at before. I've got a few questions on this.

Do you know how many letters the Harris County Sheriff's Department sends out on an annual basis to defendants who have unserved and open arrest warrants?

A. No.

Q. Do you have personal knowledge about what factors are considered by the Sheriff's Department in

determining whether to actually send out notice of an unserved warrant to a particular defendant?

A. I know they take type of offense into consideration, but that's all that I know.

Q. Would you agree that a defendant who receives one of these notice letters from the Harris County Sheriff's Department can, in fact, use the information provided to potentially lay in wait and ambush a police officer later attempting to serve a warrant on that person?

A. Yes.

Q. That is a danger that exists whenever any law enforcement agency sends out notices – is the danger that the person with the unserved arrest warrant can decide not to surrender, not to contact an attorney, but instead to retaliate against a police officer. Correct?

[60] [USCA5 3329] A. Sure. Any time they find out, there is always that risk.

Q. And the new statute restricting bail bond solicitation with respect to unserved arrest warrant does nothing to eliminate the risks that result from law enforcement mailing of notice letters. Correct?

A. The Bail Bond Board doesn't regulate law enforcement. It's just regulates bondsmen.

Q. But with respect to the Texas legislature's adoption of new rules of the Texas Occupation Code

that are intended to restrict bondsmen from communicating information about unserved arrest warrant, that statute does nothing to protect police officers about the dangers, however minimal, that result from law enforcement agencies' issuance of notice letters, like Braddock Exhibit 7. Correct?

A. Right. The Occupations Code in that chapter just regulates bail bondsmen.

Q. With respect to the information available to attorneys on the JIM System about unserved arrest warrants, those attorneys actually have an incentive to use that information to contact those defendants in order to solicit their criminal defense representation, don't they?

A. I suppose, yeah.

Q. Because in those situations whether or not a bond is going to be made available, the defendant potentially [61] [USCA5 3330] needs an attorney to represent him in a case that's sufficiently serious to be a no-bond case. Correct?

A. Yes.

Q. And so the amendments to the Texas Occupation Code that address bondsmen solicitation, in fact, do nothing to protect police officers from the danger that defendants will be made aware of an unserved arrest warrant by attorneys seeking their criminal defense representation?

A. Right. It only affects bail bondsmen.

Q. Did the Harris County Bail Bond Board make any attempt before formulating Local Rule 25 to determine to what extent members of the public were actually grateful to receive the unfortunate information that family member or a loved one or relative had been jailed?

A. No. The grateful people don't call, just the people with complaints.

* * *

[65] [USCA5 3333] Q. All right. And what are the areas, if any, that you can recall where you disagree with what Officer Harwell said or testified about with respect to Local Rules 24 and 25 and bail bond solicitation?

A. I would have to relook at his testimony.

Q. Before we go into that, in general, if Officer Harwell held an opinion different from yours about the usefulness of the bail bond solicitation rules, would you believe that he could reasonably hold an opinion based on his experience that was different from yours?

A. Of course.

(Braddock Exhibit No. 9 marked.)

Q. Let me show you what has been marked as Braddock Exhibit 9, which consists of some of Officer Harwell's testimony at the injunction hearing. And if you wish, Ms. Braddock, you can read the whole thing if you want to or otherwise I'll just try to make this

shorter by actually directing your attention to various specific sentences and go from there.

[66] [USCA5 3334] A. Okay.

Q. Whatever is your preface, you tell me and I'll respect –

A. You can point me to the cites.

Q. Specifically I'm going to direct your attention to page 59, line 21, to page 60, line 5. And there the question was: "In your opinion as a police officer, is this a good rule," referring to Rule 24 referenced in line 19 immediately above.

And he states at line 23, page 59, "In my opinion as a police officer, a bondsman nor attorney should ever be able to solicit either with prior business, because they issue another warrant for them, they are going to call them on the phone and the guy may not have the money to post his bond at that time, whatever the case may be – scenario may be, that they can't make bond right then, they are not going to make bond right then, he's going to run."

Do you see that?

A. Yes.

Q. Do you agree that a defendant with an existing bail bond poses a danger to police officers that upon being informed of the issuance of another arrest warrant, that defendant will either flee or harm the police officers because he's already spent all of his money getting the first bond?

* * *

[68] [USCA5 3336] A. No.

Q. At page 60 on lines 12-19, Officer Harwell was asked with respect to Rule 24, "Would you characterize that rule as it helps a lot or a little?"

And he answers, "It endangers him," meaning police officers, "again by contacting him and telling him he's got a warrant out for his arrest. I run into the scenario the guy will say, 'I don't have the money to make a bond.' 'Go hide for another three days or week until you make that money.' In the meantime, I'm hunting him."

Do you understand through that testimony that Officer Harwell was expressing his concern about the result of phone calls in part or whole by bondsmen who had an existing bond for a particular defendant, notifying that defendant of the issuance of a subsequent arrest warrant?

A. Right. If it were a great world in Officer Harwell's opinion, we would have zero solicitation and zero advance notice period. And I understand that's his position.

Q. That's one with which you differ but respectfully of his opinion. Correct?

A. Correct.

Q. Despite the fact that you differ from his opinion there, you recognize that whenever a defendant is represented by a bondsman who has an

existing bail bond out [69] [USCA5 3337] for him, there is still a danger that occurs whenever that bondsman notifies that defendant of the issuance of a subsequent arrest warrant?

A. Correct.

Q. Has anyone ever studied the danger, discrete danger that arises when a bondsman with an existing bail bond out for a particular defendant notifies that particular defendant that a law enforcement agency has issued yet another arrest warrant?

A. Not to my knowledge.

Q. Officer Harwell was also asked here – at the bottom of page 61 he was asked the question, "In your opinion, Rule 24, if you had to characterize whether it helped a great deal, it would cut down a lot of the danger caused to police officers or a little, what would you say?"

And you can see there his answer was, "I don't see where Rule 23 helps a peace officer at all. Any time you contact an individual and notify him that he has a warrant or another warrant, you have endangered my life."

Do you see that testimony?

A. Yes, sir.

Q. And would you agree that a police officer, such as Officer Harwell, based on his own background, training and experience could reasonably

come to that opinion even if you yourself don't personally agree with it. Correct?

[70] [USCA5 3338] A. I can personally agree with it.

Q. And so then you would agree with the fact that even if the only person notifying a defendant about the existence of an arrest warrant is a bail bondsman who already has an existing bail bond out on him, that still presents a danger to the safety of law enforcement personnel. Correct?

A. That's correct.

Q. Now, you also talked here on pages 7-9, quoted Officer Sharon Ballard about her experiences with bail bond solicitation." Correct?

A. Yes.

Q. Okay. And in that particular situation, do you also understand that the anecdote she related was one that occurred before Harris County's District Clerk instituted the 48-hour moratorium on arrest warrant information through the JIM System?

A. I wasn't certain of the date, but if that's correct, I don't quarrel with it.

Q. Specifically the instance that Officer Ballard related concerned a situation where a defendant was able to learn about the issuance of an arrest warrant almost immediately after it was issued. Correct?

A. Yes.

Q. And at least since sometime in 2001 the JIM System [71] [USCA5 3339] has been reformed or modified so that it is no longer possible and there is, in fact, a 48-hour moratorium on that information. Correct?

A. Yes.

Q. So the specific situation related by Sharon Ballard is one that would not recur here in Harris County no matter what statutes were or were not adopted in the Occupations Code concerning bondsmen's breach. Correct?

A. It wouldn't occur for the first 48 hours.

Q. And that first 48 hours exists in order to give sheriff's officers an opportunity to actually serve a warrant on a known defendant who has been charged with something like sexual abuse of a child.

A. Right. Give peace officer the opportunity to arrest.

* * *

RESPONDENTS' APPENDIX/EXCERPT 28

[USCA5 4672]

ABC Bonding Company
400 San Jacinto
Houston, Texas 77002
713/222-6222

July 11, 2003

To: **All Harris County Licensed Bail Agents**

RE: **Affidavit – State Law limiting solicitation**

Attached is the affidavit that several of you requested during our monthly meeting.

Effective June 20th when Governor Perry signed Senate bill 1336, State Law now limits bail bond solicitation. Attached is a copy of the those limitation. Violation can result in suspension or revocation of a bail bond license.

The attached affidavit may be used to document potential violations. After the consumer has documented the occurrence, the consumer should have the affidavit notarized and submit the information to Sgt. Carr.

If possible, obtain a copy of the completed affidavit for your files and let me know there was a potential violation of this State Law

Sincerely,

/s/ David Schmidt
David Schmidt

[USCA5 4675]

THE STATE OF TEXAS
COUNTY OF HARRIS

BEFORE ME, the undersigned authority, on this day personally appeared _____, who, being by me duly sworn on this oath did depose and say:

"My name is _____

My address is _____

Home phone _____ Work phone _____

I was called by _____ bonding companies at the following approximate times and dates:

_____

The call/calls were related to bonding _____
Spn# _____

Callers identification: Caller's Name	Bonding Company	Caller ID	Phone Number
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

Summary of conversation: _____

_____

_____

_____

Offensive nature of call/calls; Invasion of privacy ___, Harassing ___, Infringement of time ___

Comments: _____

_____

_____

_____

_____

_____"

Signed _____

Printed Name _____

SUBSCRIBED AND SWORN TO BEFORE ME, on this the _____ day of _____, 2001, to certify which witness my hand and official seal.

_____

Notary Public in and for the State of Texas.

_____

RESPONDENTS' APPENDIX/EXCERPT 29

S.B. No. 244

AN ACT

relating to the temporary sealing of certain affidavits on which search warrants are based.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subsection (b), Article 18.01, Code of Criminal Procedure, is amended to read as follows:

(b) No search warrant shall issue for any purpose in this state unless sufficient facts are first presented to satisfy the issuing magistrate that probable cause does in fact exist for its issuance. A sworn affidavit setting forth substantial facts establishing probable cause shall be filed in every instance in which a search warrant is requested. *Except as provided by Article 18.011, the* [~~The~~] affidavit is public information if executed, and the magistrate's clerk shall make a copy of the affidavit available for public inspection in the clerk's office during normal business hours.

SECTION 2. Chapter 18, Code of Criminal Procedure, is amended by adding Article 18.011 to read as follows:

Art. 18.011. SEALING OF AFFIDAVIT. (a) An attorney representing the state in the prosecution of felonies may request a district judge or the judge of an appellate court to seal an affidavit presented under Article 18.01(b). The judge may order the affidavit

sealed if the attorney establishes a compelling state interest in that:

(1) public disclosure of the affidavit would jeopardize the safety of a victim, witness, or confidential informant or cause the destruction of evidence; or

(2) the affidavit contains information obtained from a court-ordered wiretap that has not expired at the time the attorney representing the state requests the sealing of the affidavit.

(b) An order sealing an affidavit under this section expires on the 31st day after the date on which the search warrant for which the affidavit was presented is executed. After an original order sealing an affidavit is issued under this article, an attorney representing the state in the prosecution of felonies may request, and a judge may grant, before the 31st day after the date on which the search warrant for which the affidavit was presented is executed, on a new finding of compelling state interest, one 30-day extension of the original order.

(c) On the expiration of an order issued under Subsection (b) and any extension, the affidavit must be unsealed.

(d) An order issued under this section may not:

(1) prohibit the disclosure of information relating to the contents of a search warrant, the return of a search warrant, or the inventory of property taken pursuant to a search warrant; or

(2) affect the right of a defendant to discover the contents of an affidavit.

SECTION 3. This Act applies only to an affidavit that is presented under Subsection (b), Article 18.01, Code of Criminal Procedure, as amended by this Act, on or after the effective date of this Act. An affidavit that is presented before the effective date of this Act is covered by the law in effect at the time the affidavit was presented, and the former law is continued in effect for that purpose.

SECTION 4. This Act takes effect September 1, 2007.

President of the Senate

Speaker of the House

I hereby certify that S.B. No. 244 passed the Senate on March 29, 2007, by the following vote: Yeas 29, Nays 1.

Secretary of the Senate

I hereby certify that S.B. No. 244 passed the House on May 15, 2007, by the following vote: Yeas 135, Nays 5, two present not voting.

Chief Clerk of the House

Approved:

Date

Governor

BILL ANALYSIS

Senate Research Center

S.B. 244
By: Williams et al.
Criminal Justice
5/24/2007
Enrolled

AUTHOR'S/SPONSOR'S STATEMENT OF INTENT

According to Article 18.01(b), Code of Criminal Procedure, a sworn affidavit filed for a search warrant is public information if the warrant is executed. As interpreted by the Texas courts, this provision requires executed search warrant affidavits to be made immediately available to the public. Certain circumstances may demonstrate a compelling interest in temporarily sealing these affidavits from public disclosure, such as circumstances where revelation of the information necessary to obtain a warrant could result in the destruction of evidence or other tampering that could negatively impact an ongoing investigation.

S.B. 244 authorizes a district or appellate court to seal an affidavit when there is a compelling state interest for doing so, for a specified time period. The bill prohibits an order sealing an affidavit from affecting the disclosure of certain information or affecting certain rights of a defendant.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Article 18.01(b), Code of Criminal Procedure, to make a conforming change.

SECTION 2. Amends Chapter 18, Code of Criminal Procedure, by adding Article 18.011, as follows:

> Art. 18.011. SEALING OF AFFIDAVIT. (a) Authorizes a felony prosecutor to request a district judge or judge of an appellate court to seal an affidavit for a search warrant (affidavit) presented under Art. 18.01(b). Authorizes the judge to order the affidavit sealed if the prosecutor establishes a compelling state interest that public disclosure would jeopardize the safety of a victim, witness, or confidential informant or cause the destruction of evidence, or the affidavit contains information from an unexpired court-ordered wiretap.
>
> (b) Provides that an order sealing an affidavit expires 31 days after execution of the related search warrant. Authorizes the prosecutor to request, and the judge to grant, a 30-day extension of the original order.
>
> (c) Requires that the affidavit be unsealed after expiration of the order and any extensions.

(d) Prohibits an order issued under this subsection from prohibiting the disclosure of information relating to the contents of a search warrant, the return of a search warrant, the inventory or property taken with a search warrant, or affecting the right of a defendant to discover the affidavit's contents.

SECTION 3. Makes application of Article 18.01(b), Code of Criminal Procedure, as amended by this Act, prospective.

SECTION 4. Effective date: September 1, 2007.